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Mohamed Apandi bin Ali v Lim Kit Siang

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-23CY-37–07 OF 2019
AZIMAH OMAR J
23 MAY 2022

C *Tort — Defamation — Libel — Defendant published article containing statement against plaintiff as Attorney General — Defendant pleaded defences of justification, fair comment or qualified privilege — Whether statement was defamatory — Whether non-justiciability or non-reviewability of plaintiff's prerogatives barred or restrained against public scrutiny, dialogue, investigation, or*
D *commentary — Whether defendant's defence could only be determined based on facts available at material time impugned statement was published — Whether defendant succeeded in defence of justification — Whether defendant succeeded in proving its defence of fair comment — Whether defendant succeeded in proving its defence of qualified privilege*

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This was a claim for tortious defamation where the plaintiff was claiming for inter alia RM10m in general damages against the defendant for the publication of an article authored by the defendant which the plaintiff alleged was defamatory and had tarnished his reputation. The plaintiff once held one of the
F most important position in the public service as the Attorney General of Malaysia ('the AG'). The plaintiff's tenure as the AG reigned from 2015 to 2018 which coincided with the reign of the ex-Prime Minister Najib Razak ('Najib Razak'). The defendant was a notable senior and veteran politician under the umbrella of the political party namely; the Democratic Action Party
G ('DAP') and was a member of Parliament for the constituency of Iskandar Puteri. The plaintiff's claim for damages in this defamation suit against the defendant was by and large related to the globally infamous 1MDB (inclusive of the SRC) scandal. The plaintiff during his AG's tenure and at the height of the scrutiny and revelations of the 1MDB scandal took issue against the
H defendant's published words and statements regarding the plaintiff's alleged actions (and inactions) in dealing with the investigation and prosecution of the 1MDB scandal during his tenure as the AG. The defendant lamented and published an article in the defendant's own blog (which later was republished by MalaysiaKini in its own website) ('the impugned article'). In essence the
I plaintiff took serious issue with the following paragraph of the impugned article ('impugned statement'): 'Apandi, who was appointed attorney-general in July 2015 when Abdul Gani Patail was summarily sacked from his office when it word went around that Gani was preparing to charge Najib with corruption, should explain why he aided and abetted in the 1MDB scandal'.

The plaintiff's claim was that he believed that the defendant's statements was defamatory and had tarnished his reputation and sound integrity as the ex-AG. The plaintiff insisted that he had only exonerated Najib Razak, based on the evidence and facts available to him at the time he was in office. The defendant on the contrary insisted that his comments were not defamatory, and even if it was, the defamatory statement was not an actionable tort as the defendant's statements were justified, fair comment or a qualified privilege.

Held, dismissing the claim:

(1) The plaintiff's strict and legalistic interpretation of 'aiding and abetting' (as a criminal offence) was far too extreme and far-fetched for the reasonable comprehension of the ordinary man who was without the special knowledge of criminal law. The impugned statement ought to be ascribed the lesser meaning that the plaintiff had by his acts or omission (during his tenure in the office of the AG) absolved and exonerated the perpetrators of the 1MDB scandal (SRC included) and consequently covered up the same scandal. Therefore, the plaintiff's fervent insistence on the absence of criminal prosecution, criminal commission, or criminal conviction of the plaintiff (on the criminal offence of aiding and abetting) was entirely unhelpful to prove the plaintiff's case, and was also entirely irrelevant to dispute the defendant's defence. The impugned statement could essentially be dissected into two limbs. The first half being a 'beckoning' or an 'invitation' for the plaintiff to avail himself to explain: 'Apandi ... should explain ...'. The second half thereafter being the hypothetical commission of a certain act: '... why he aided and abetted in the 1MDB scandal'. The impugned statement could only carry at best, a Chase Level 3 imputation. The plaintiff was specifically named and beckoned to avail himself to explain his disposition and his alleged cover-up of the 1MDB scandal. Thus, it was equally possible to ascribe the lesser meaning that there were reasonable grounds for investigations to be conducted and for the plaintiff to come forth and give his explanation on the matter. The impugned statement was at most capable of the lesser defamatory meaning of 'There are reasonable grounds for the plaintiff to be investigated for his actions or inactions during his term as AG, which may have provided a cover-up for the 1MDB scandal, and the suspected persons involved in the same scandal'. The lesser meaning ascribed was defamatory (see paras 40, 43–47, 49 & 50).

(2) The non-justiciability or non-reviewability of the plaintiff's prerogatives was by no means any barred or restrainted against public scrutiny, dialogue, investigation, or commentary. There was no nexus whatsoever between the people's right to criticise or question the plaintiff's prerogatives and the non-justiciability or non-reviewability of the plaintiff's prerogatives in court. Even if the AG's prerogatives were

non-justiciable and non-reviewable in court, it did not at all mean that those prerogatives could not be scrutinised in the public sphere. Since the court was not moved, and in fact could not be moved to review and force the AG to exercise his discretions, therefore, it still remained within the court's discretion to consider facts and evidences to deliberate on the plaintiff's actions and inactions, at the very least to determine the fairness, truth and justifiability of the defendant's impugned statement (see paras 55–56).

(3) The subsequent event of Najib Razak's conviction was vividly consanguineous and proximate to the impugned event that the plaintiff had previously absolved and exonerated Najib Razak of the same exact criminal offence he was later found guilty of (during the plaintiff's tenure as the AG). The mere alluding to the SRC decision did not necessarily or automatically mean that the defendant was unraveling the SRC trial and decision. The defendant thus far had alluded to the SRC case and decision only as part of his facts and evidence to prove his pleaded defence of justification. Not to dispute or to relitigate the SRC trial (see paras 66 & 69–70).

(4) The facts and evidence before the court satisfied the justification in Chase Levels 1 and 2. The peculiar and questionable circumstances plaguing the plaintiff's decision to absolve Najib Razak, and hastily accepted the donation narrative could equally give rise to suspicion of a cover-up, or the commission of the cover-up in and of itself. Considering the blatantly obvious knowledge of the monies siphoned from SRC to Najib Razak's personal account, it was suspicious and reasonable to ponder why the plaintiff as the AG would insist on accepting the donation narrative although the evidence in his own hands and knowledge indicated that the monies were paid from 1MDB's own former subsidiary, and not at all from any Saudi Royalty's account (see paras 84 & 91).

(5) Apart from exonerating Najib Razak, the plaintiff also marked the investigation to be 'No Further Action' or 'Kemas untuk Simpan' ('NFA/KUS'). The plaintiff's own witness testified that the plaintiff had insisted on concluding investigations although the plaintiff's own internal task force recommended for continued and further investigations. It was utterly inconceivable that the plaintiff would NFA/KUS the investigation. The plaintiff's action in hastily closing and concluding investigations, and the plaintiff's inaction to meaningfully investigate the matter, indeed justified the defendant's imputation that the plaintiff ought to be investigated for his conducts which may had assisted in the cover-up of the 1MDB scandal (see paras 94, 102 & 108–109).

(6) The plaintiff failed to make any good sense out of his unwavering and unyielding insistence to not offer or seek mutual legal assistance from the

Swiss Government and the United States DOJ although admitting that mutual legal assistance may well bolster local investigations especially in view of tracing the monies which were siphoned out of the Malaysian jurisdiction. It was sublimely apparent that all his conducts indeed reasonably infer an effective cover-up of the 1MDB scandal and the personalities within the scandal. The defendant indeed had led concrete evidence to justify his defamatory imputations (across all Chase Levels 1, 2 and 3 imputations). The evidence and circumstances did give reasonable grounds to investigate the plaintiff, and the same evidence and circumstances went as far as to give reasonable grounds of suspicion and in fact, commission of the plaintiff's cover-up of the 1MDB scandal. Thus, it was exceedingly obvious that the defendant had successfully led cogent evidence to succeed in his defence of justification (see paras 138 & 140–142).

(7) The defendant had failed to comply with the statutory requirement under O 78 r 3 of the Rules of Court 2012 (in failing to appropriately particularise and demarcate which portion of the impugned statement were facts, and which portion of the same were comments). The defendant's pleaded defence under the heading of fair comment was indeed brief and was clearly lacking the appropriate particularisation that was statutorily required to be pleaded. Thus, although succeeding in proving his defence of justification, the defendant had (on this technicality) failed to satisfy the court of his defence of fair comment (see paras 146–148).

(8) The defendant had satisfied the two pre-requisites before he could rely on the defence of qualified privilege. All of the reasonable and foreseeable channels had been exhausted and thus, the defendant was well within his rights to voice out his thoughts to the public at large. The defendant had an interest, or duty, legal, social or moral obligation to publish the impugned statement in his blog. On the same score, the *rakyat* and public at large absolutely had a corresponding interest to be in-the-know and informed to all movements and calls against the plaintiff to explain himself and his actions (and inactions) which directly and indirectly lend a hand in covering-up the 1MDB scandal and the known personalities involved. Thus, the defendant had succeeded in proving his defence of qualified privilege. Thereto, since the defendant had successfully proven his defence of justification and qualified privilege, his publication of the impugned statement was not actionable against the defendant (see paras 155, 157 & 160–161).

[Bahasa Malaysia summary

Ini adalah tuntutan untuk tort fitnah di mana plaintif menuntut antara lain RM10 juta sebagai ganti rugi am terhadap defendan untuk penerbitan artikel yang dikarang oleh defendan yang didakwa oleh plaintif sebagai fitnah dan

telah mencemarkan nama baiknya. Plaintif pernah memegang salah satu jawatan terpenting dalam perkhidmatan awam sebagai Peguam Negara Malaysia ('AG'). Tempoh plaintif sebagai AG memerintah dari 2015 hingga 2018 yang serentak dengan pemerintahan bekas Perdana Menteri Najib Razak ('Najib Razak'). Defendan merupakan seorang ahli politik senior dan veteran yang terkenal di bawah payung parti politik iaitu; Democratic Action Party ('DAP') dan pernah menjadi ahli Parlimen bagi kawasan pilihan raya Iskandar Puteri. Tuntutan plaintif untuk ganti rugi dalam saman fitnah ini terhadap defendan pada umumnya berkaitan dengan skandal 1MDB (termasuk SRC) yang terkenal di seluruh dunia. Plaintif semasa tempoh AG beliau dan pada kemuncak penelitian dan pendedahan skandal 1MDB mengambil isu terhadap kata-kata dan kenyataan defendan yang diterbitkan berhubung dakwaan tindakan (dan tiada tindakan) plaintif dalam menangani penyiasatan dan pendakwaan skandal 1MDB semasa beliau memegang jawatan sebagai AG. Defendan mengeluh dan menerbitkan artikel dalam blog defendan sendiri (yang kemudiannya diterbitkan semula oleh MalaysiaKini dalam laman webnya sendiri) ('artikel yang dipersoalkan'). Pada dasarnya plaintif mengambil isu serius dengan perenggan berikut dalam artikel yang dipersoalkan ('pernyataan yang dipersoalkan'): 'Apandi, who was appointed attorney-general in July 2015 when Abdul Gani Patail was summarily sacked from his office when it word went around that Gani was preparing to charge Najib with corruption, should explain why he aided and abetted in the 1MDB scandal'. Dakwaan plaintif adalah bahawa dia percaya bahawa kenyataan defendan adalah fitnah dan telah mencemarkan reputasi dan integritinya sebagai bekas AG. Plaintif menegaskan bahawa beliau hanya membebaskan Najib Razak, berdasarkan bukti dan fakta yang ada padanya semasa beliau memegang jawatan. Defendan sebaliknya menegaskan bahawa ulasannya tidak memfitnah, dan jika betul, kenyataan memfitnah itu bukanlah tort yang boleh diambil tindakan kerana kenyataan defendan adalah wajar, ulasan yang adil atau perlindungan bersyarat.

Diputuskan, menolak tuntutan:

(1) Tafsiran ketat dan legalistik plaintif tentang 'aiding and abetting' (sebagai kesalahan jenayah) adalah terlalu melampau dan tidak masuk akal untuk pemahaman munasabah lelaki biasa yang tidak mempunyai pengetahuan khusus tentang undang-undang jenayah. Kenyataan yang dipersoalkan itu sepatutnya dianggap sebagai makna yang lebih kecil yang plaintif miliki melalui perbuatan atau peninggalannya (semasa memegang jawatan AG) membebaskan dan membebaskan pesalah skandal 1MDB (termasuk SRC) dan seterusnya menutup skandal yang sama. Oleh itu, desakan bersungguh-sungguh plaintif terhadap ketiadaan pendakwaan jenayah, komisen jenayah, atau sabitan jenayah terhadap plaintif (atas kesalahan jenayah membantu dan bersubahat) sama sekali tidak membantu untuk membuktikan kes plaintif, dan juga sama sekali tidak

relevan untuk mempertikaikan pembelaan defendan. Kenyataan yang dipersoalkan pada asasnya boleh dipecahkan kepada dua bahagian. Bahagian pertama menjadi 'seruan' atau 'jemputan' untuk plaintif sendiri menjelaskan: 'Apandi ... should explain ...'. Bahagian kedua selepas itu adalah komisen hipotesis bagi perbuatan tertentu: '... why he aided and abetted in the 1MDB scandal'. Kenyataan yang dipersoalkan hanya boleh membawa pada yang terbaik, tuduhan Chase Level 3. Plaintif telah dinamakan secara khusus dan digesa untuk dirinya menjelaskan sikapnya dan dakwaan beliau menutup skandal 1MDB. Oleh itu, adalah sama mungkin untuk menganggap maksud yang lebih kecil bahawa terdapat alasan yang munasabah untuk penyiasatan dijalankan dan untuk plaintif tampil dan memberikan penjelasannya mengenai perkara itu. Kenyataan yang dipersoalkan itu paling kurang daripada maksud fitnah yang lebih kecil iaitu 'There are reasonable grounds for the plaintiff to be investigated for his actions or inactions during his term as AG, which may have provided a cover-up for the 1MDB scandal, and the suspected persons involved in the same scandal'. Makna yang lebih kecil yang disifatkan adalah fitnah (lihat perenggan 40, 43–47 & 49–50).

(2) Prerogatif tidak boleh adili atau tidak boleh disemak plaintif sama sekali tidak disekat atau dihalang terhadap penelitian awam, dialog, penyiasatan atau ulasan. Tiada pertalian apa-apa pun antara hak rakyat untuk mengkritik atau mempersoalkan prerogatif plaintif dan prerogatif tidak boleh adili atau tidak boleh disemak plaintif di mahkamah. Walaupun prerogatif AG tidak boleh adili atau tidak boleh disemak di mahkamah, ia sama sekali tidak bermakna bahawa hak prerogatif tersebut tidak boleh diteliti di ruang awam. Oleh kerana mahkamah tidak dipohon, dan sebenarnya tidak boleh dipohon untuk menyemak dan memaksa AG untuk menggunakan budi bicaranya, oleh itu, ia masih berada dalam budi bicara mahkamah untuk mempertimbangkan fakta dan bukti untuk membincangkan tindakan dan tiada tindakan plaintif, pada sekurang-kurangnya untuk menentukan keadilan, kebenaran dan kewajaran kenyataan yang dipersoalkan defendan (lihat perenggan 55–56).

(3) Peristiwa sabitan Najib Razak yang berikutnya adalah jelas dan hampir dengan peristiwa yang dipersoalkan bahawa plaintif sebelum ini telah melepaskan dan membebaskan Najib Razak daripada kesalahan jenayah yang sama yang kemudiannya didapati bersalah (semasa plaintif memegang jawatan sebagai AG). Sekadar merujuk kepada keputusan SRC tidak semestinya atau secara automatik bermakna defendan sedang merungkai perbicaraan dan keputusan SRC. Defendan setakat ini telah merujuk kepada kes dan keputusan SRC hanya sebagai sebahagian daripada fakta dan keterangannya untuk membuktikan pembelaan beliau terhadap justifikasi. Bukan untuk mempertikaikan atau mengadili semula perbicaraan SRC (lihat perenggan 66 & 69–70).

(4) Fakta dan keterangan di hadapan mahkamah memenuhi justifikasi dalam Chase Levels 1 and 2. Keadaan pelik dan dipersoalkan yang melanda keputusan plaintif untuk melepaskan Najib Razak, dan dengan tergesa-gesa menerima naratif derma itu sama-sama boleh menimbulkan syak wasangka perlindungan, atau perbuatan perlindungan itu sendiri. Memandangkan pengetahuan yang jelas mengenai wang yang dibawa daripada SRC ke akaun peribadi Najib Razak, adalah mencurigakan dan munasabah untuk memikirkan mengapa plaintif sebagai AG berkeras untuk menerima naratif derma walaupun bukti di tangan dan pengetahuannya sendiri menunjukkan bahawa wang itu telah dibayar daripada bekas anak syarikat 1MDB sendiri, dan tidak sama sekali daripada mana-mana akaun Royalti Saudi (lihat perenggan 84 & 91).

(5) Selain membebaskan Najib Razak, plaintif juga menandakan siasatan sebagai 'No Further Action' atau 'Kemas untuk Simpan' ('NFA/KUS'). Saksi plaintif sendiri memberi keterangan bahawa plaintif telah berkeras untuk menyelesaikan penyiasatan walaupun pasukan petugas dalaman plaintif sendiri mengesyorkan untuk meneruskan dan siasatan lanjut. Tidak dapat dibayangkan bahawa plaintif akan NFA/KUS siasatan. Tindakan plaintif menutup dan memuktamadkan penyiasatan secara tergesa-gesa, dan ketiadaan tindakan plaintif untuk menyiasat perkara itu, sememangnya mewajarkan tuduhan defendan bahawa plaintif patut disiasat kerana kelakuannya yang mungkin telah membantu dalam menutup skandal 1MDB (lihat perenggan 94, 102 & 108–109).

(6) Plaintif gagal memberi alasan daripada desakan yang tidak berbelah bahagi dan tidak berganjak untuk tidak menawarkan atau mendapatkan bantuan undang-undang bersama daripada Kerajaan Switzerland dan DOJ Amerika Syarikat walaupun mengakui bahawa bantuan undang-undang bersama mungkin dapat meningkatkan penyiasatan tempatan terutamanya dalam mengesan wang yang dibawa keluar dari bidang kuasa Malaysia. Jelas sekali bahawa semua kelakuannya sememangnya secara munasabah menyimpulkan penutupan berkesan skandal 1MDB dan personaliti dalam skandal itu. Defendan sememangnya telah membawa bukti konkrit untuk mewajarkan tuduhan fitnahnya (merentasi semua tuduhan Chase Levels 1, 2 and 3). Bukti dan keadaan telah memberikan alasan yang munasabah untuk menyiasat plaintif, dan keterangan dan keadaan yang sama juga memberikan alasan syak wasangka yang munasabah dan sebenarnya, pelakuan plaintif menutup skandal 1MDB. Oleh itu, adalah sangat jelas bahawa defendan telah berjaya mengetuai bukti yang kukuh untuk berjaya dalam pembelaan justifikasinya (lihat perenggan 138 & 140–142).

(7) Defendan telah gagal untuk mematuhi keperluan statutori di bawah A 78 k 3 Kaedah-Kaedah Mahkamah 2012 (dengan kegagalan untuk

mengkhususkan dan menandakan bahagian mana daripada pernyataan yang dipersoalkan itu adalah fakta, dan bahagian mana yang sama adalah ulasan). Pembelaan defendan di bawah tajuk ulasan yang adil sememangnya ringkas dan jelas tidak mempunyai perincian yang sesuai yang dikehendaki mengikut undang-undang untuk dirayu. Oleh itu, walaupun berjaya membuktikan pembelaannya atas justifikasi, defendan telah (dengan teknikal ini) gagal untuk memuaskan hati mahkamah pembelaannya terhadap ulasan yang adil (lihat perenggan 146–148).

(8) Defendan telah memenuhi dua pra-syarat sebelum boleh bergantung pada pembelaan perlindungan bersyarat. Semua saluran yang munasabah dan boleh dijangka telah kehabisan dan oleh itu, defendan berada dalam haknya untuk menyuarakan pemikirannya kepada orang ramai secara umum. Defendan mempunyai kepentingan, atau kewajipan, tanggungjawab undang-undang, sosial atau moral untuk menerbitkan kenyataan yang dipersoalkan dalam blognya. Pada skor yang sama, rakyat dan orang awam secara keseluruhannya mempunyai kepentingan yang sama untuk mengetahui dan dimaklumkan kepada semua pergerakan dan seruan terhadap plaintif untuk menjelaskan dirinya dan tindakannya (dan tiada tindakan) yang secara langsung dan tidak langsung membantu dalam menutup skandal 1MDB dan personaliti terkenal yang terlibat. Oleh itu, defendan telah berjaya membuktikan pembelaan beliau terhadap perlindungan bersyarat. Oleh sebab itu, oleh kerana defendan telah berjaya membuktikan pembelaannya terhadap justifikasi dan perlindungan bersyarat, penerbitan pernyataan yang dipersoalkan itu tidak boleh diambil tindakan terhadap defendan (lihat perenggan 155, 157 & 160–161).]

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321, HC (refd)

Bar Malaysia v Peguam Negara Malaysia & Anor [2016] MLJU 1597, HC (refd)

Chase v Newsgroup Newspapers Ltd [2002] EWCA Civ 1772, CA (refd)

Chong Chieng Jen v Government of State of Sarawak & Anor [2019] 3 MLJ 300, FC (refd)

Chong Siew Chiang v Chua Ching Geh & Anor [1992] 1 MLRH 535, HC (folld)

Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242, CA (refd)

Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin [2016] 6 MLJ 226, HC (folld)

Jeramas Sdn Bhd & Anor v Datuk Wong Sze Phin @ Jimmy Wong [2021] MLJU 2037; [2021] MLRHU 1598, HC (refd)

Khairul Azwan bin Harun v Mohd Rafizi bin Ramli [2017] 9 MLJ 205, HC (refd)
Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd [1963] 2 All ER 151, HL (folld)
Mkini Dotcom Sdn Bhd & Ors v Raub Australian Gold Mining Sdn Bhd [2021] 5 MLJ 79, FC (refd)
PP v Dato' Sri Mohd Najib bin Hj Abd Razak [2020] 11 MLJ 808, HC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187; [2015] 8 CLJ 477, FC (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56; [1973] 1 LNS 146 (refd)
Tan Sri Dato' Lim Guan Teik v Tan Kai Hee [2014] 9 MLJ 363; [2013] 10 CLJ 771, HC (refd)
Tan Sri Dato' Seri Dr M Mahadevan v Dr Jeyaratnam s/o Mahalingam Ratnavale [2015] MLJU 1998, HC (folld)

Legislation referred to

Criminal Procedure Code s 376(1)
Evidence Act 1950 s 43
Federal Constitution art 145, 145(2)
Mutual Assistance in Criminal Matters Act 2002 s 8(2)
Penal Code
Rules of Court 2012 O 78 r 3

M Visvanathan (with R Karnan and V Sanjay Nathan) (Saibullah MV Nathan & Co) for the plaintiff.
Sangeet Kaur Deo (with Simranjit Kaur Chhran Daljit Singh) (Karpal Singh & Co) for the defendant.

Azimah Omar J:

A. INTRODUCTION

[1] The present case before this court is a claim for tortious defamation involving two prominent individuals wherein the plaintiff is claiming for, inter alia, RM10m in general damages against the defendant for the publication of an article authored by the defendant which the plaintiff alleged was defamatory and had tarnished his reputation.

[2] The plaintiff is Mohamed Apandi bin Ali who once held one of the most important position in the public service as the Attorney General of Malaysia ('the Malaysian AG/the AG'). The plaintiff's tenure as the Malaysian AG reigned from 2015 to 2018 which coincided with the reign of the ex-Prime Minister Najib Razak.

[3] At this juncture, it is pertinent to observe that art 145(2) of the Federal Constitution explicitly prescribed that the AG shall have the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial. In addition, s 376(1) of the Criminal Procedure Code ('the Code') has vividly spelt out that the AG shall be the Public Prosecutor of Malaysia who shall have the control and direction of all criminal prosecutions and the proceedings instituted and governed under the Code.

[4] It must be mentioned here that the plaintiff also previously served as a member of the Malaysian Judiciary serving as a judge of the Federal Court, the Court of Appeal, the High Court, and as a judicial commissioner of the High Court, prior to his appointment as the Attorney General on 27 July 2015.

[5] Whilst the defendant, Lim Kit Siang undeniably is a notable senior and veteran politician under the umbrella of the political party namely; the Democratic Action Party (DAP). The defendant is a member of Parliament for the constituency of Iskandar Puteri having a public service centre at No 15-01, Jalan Prima Niaga 1, Taman GP Prima, 81550 Gelang Patah, Johor DT and/or at address C/O DAP@ Jalan Yew off Jalan Pudu, 55100 Kuala Lumpur.

[6] This court wishes to emphasise that the plaintiff's claim for damages in the present defamation suit against the defendant is by and large related to the globally infamous 1MDB (inclusive of the SRC) scandal which is still plaguing the nation to this very day.

[7] Indeed, so much has been uttered, commented, and lamented on what history can only regard as 'the greatest and vile corruption and thievery of the modern times'.

[8] Succinctly so, the plaintiff during his AG's tenure (during the reign of the ex-Prime Minister Najib Razak) and at the height of the scrutiny and revelations of the 1MDB scandal now takes issue against the defendant's published words and statements regarding the plaintiff's alleged actions (and inactions) in dealing with the investigation and prosecution of the 1MDB scandal during his tenure as the Attorney General.

[9] Articulating his thoughts regarding the numerous prosecutions (now, even criminal conviction) of known individuals embroiled in the 1MDB scandal, the defendant lamented and published an article entitled 'Dangerous Fallacy to think Malaysia's on the road to integrity' dated 6 May 2019 in the defendant's own blog (which later was republished by MalaysiaKini in its own website) ('the impugned article'). The impugned article, inter alia, contains the following excerpts:

> ... I must thank Pandikar for finally identifying his role in the 1MDB scandal in his continuing attempt to whitewash the 1MDB scandal, belonging to the group referred to by the prime minister in Ipoh, who felt the Pakatan Harapan government should not continue but that the country should go back to the corrupt government of the past which made Malaysia a kleptocracy.
>
> Pandikar has turned the Sandakan by-election into a touchstone about Malaysia's commitment to get to the bottom of the heinous 1MDB scandal and to transform Malaysia from a global kleptocracy to a leading nation in integrity or to go back to the old corrupt ways.
>
> Former attorney-general Mohamad Apandi Ali said yesterday that concerns that ratifying the Rome Statute of the International Criminal Court would affect the Federal Constitution and Malay rulers led the Attorney-General's Chambers during his time to reject the treaty. This was during the administration.
>
> Apandi, who was appointed attorney-general in July 2015 when Abdul Gani Patail was summarily sacked from his office when it word went around that Gani was preparing to charge Najib with corruption, should explain why he aided and abetted in the 1MDB scandal.

[10] Contextually relevant to the publication of the impugned article, at the time of publication, the Barisan Nasional Government had fell and suffered a grievous defeat during the 2018 14th General Election, while Tun Mahathir was inaugurated as Malaysia's Seventh Prime Minister, and the plaintiff was relinquished of his position and office as the nation's Attorney General.

[11] Subsequent to these events as well, the Attorney General's Office (now headed by the new Attorney General) had proceeded to prosecute (and even secured conviction at High Court and at appeal) of known suspects and alleged conspirators of the 1MDB scandal (which the plaintiff himself personally exonerated and cleared during his tenure as Attorney General).

[12] The plaintiff's claim simply put, is that he believes that the defendant's statements was defamatory and had tarnished his reputation and sound integrity as the nation's ex-Attorney General.

[13] The plaintiff insisted that he had only exonerated the then Prime Minister Najib Razak ('Najib Razak'), based on the evidence and facts available to him at the time he was in office. The plaintiff's whole case and testimony is thematic to his insistence that he did no wrong and was merely tied to the limited reports and investigations available to him while he was in office.

[14] The defendant on the contrary insists that his comments were not defamatory, and even if it was, the defamatory statement is not an actionable tort as the defendant's statements were justified, fair comment or a qualified privilege.

[15] The defendant insisted that the published words should appropriately be contextualised to the public outcry, and known issues in the public domain (in that the plaintiff ought to explain or ought to be investigated for his hasty and outright perplexing exoneration and refusal to prosecute or further investigate the 1MDB scandal even at the face of the reports and facts available during his tenure as Attorney General).

[16] Before this court delves into the essence of each parties' narrative and substance, it is most opportune for this court to first lay, in the clearest of terms, the machinations and elements in proving or disproving an actionable defamation as a tort.

B. THE LAW AND MECHANISM OF DEFAMATION AS AN ACTIONABLE TORT

[17] Now, the reason this court emphasises the term 'actionable defamation' is simply because of the rudimentary misconception that any written libel or spoken slander is an actionable tort. Of course any libellous or slanderous statement would impugn and reduce the standing of a person in the public eye, but not all libellous or slanderous statements are actionable as tort in the court of law.

[18] It is pertinent that the people (subjects of the law) appropriately appreciate that people can and is well within their freedom of speech to criticise, scrutinise, and comment, even if the critic, scrutiny, and commentary seeks to demean another's reputation or sentiments. Just because a statement in its nature would defame another's reputation does not automatically make that defamatory statement an actionable tort. If any and all defamatory statement can be an actionable tort, then the courts would unnecessarily be inundated with defamation actions and the nation would be deprived of an integral form of check and balance, and meaningful or piercing dialogue into the affairs and administration of the country.

[19] But of course, that is not to say that this freedom of speech is without its limitations. What would set apart an actionable defamation and a non-actionable defamation is simply the facts, context, and circumstances surrounding the defamatory statement that would either gloss the defamatory statement to be justified, fair comment or privileged (as per the defence pleaded) or instead, expose the defamatory statement to be unfair comment, untruthful, and unjustified.

[20] Thus, the determination of a case for defamation is in actuality a two-tiers exercise. First, to determine whether or not a statement is defamatory, and second, to determine whether or not that defamatory statement (if first

found to be defamatory) is justifiable, fair comment or privileged (depending on the defence pleaded by the defendant). Only if the defamatory statement is found to be unfair, baseless, or unjustifiable (disjunctively based on the pleaded defence) that the defamatory statement becomes an actionable defamation.

[21] This court is beckoned to explain this distinction so as to appropriately endow all subjects of the law to be properly aware, cautious, and discerning when exercising their freedom of speech and when exercising their rights to seek this court's justice and protection of the law in exercising the same freedom of speech. On one hand, in the same manner that lawyers are ethically beckoned not to strife litigation, so does the people should not be too quick to take legalistic arms for hurt feelings or tarnished reputations. On the other hand, the same manner that lawyers are beckoned to uphold justice, so does the people should exercise their freedom of speech in utmost fairness, sound reasonableness, mutual respect, dignity, and justice.

[22] Nevertheless, if indeed a defamatory statement becomes actionable (which transcends beyond the threshold of any fairness, truth, privilege, or justification), then by all means, this court can be the arena in which the people can seek for justice and legal remedies.

C. THE FIRST TIER EXERCISE: DETERMINING THE APPROPRIATE MEANING OF THE ALLEGED DEFAMATORY STATEMENT AND WHETHER OR NOT IT IS DEFAMATORY

[23] Now, it is pertinent to fully appreciate the depth and intricacies involved in just the first tier of the exercise (which is to determine whether or not the statement complained of is defamatory). Even before this court can begin to analyse the words contained in the statement, this court must keep itself minded on the appropriate threshold of comprehension and knowledge against which the statement will be tested upon. The reason this awareness is important is simply because this awareness will appropriately set the limit and scope of the court's examination and not embark on an expedition to the extent of proving (or disproving) actual criminality, criminal conduct or the actual commission of a crime in a strict legalistic sense. Of course, in the second tier of the exercise, this court is open to deliberate and consider evidence of facts of allegations made (to determine the fairness, justifiability, or the truth of a statement) but at no point in time the threshold should be expected to be the same to a legalistic exercise to prove a criminal offence, or even a civil wrong.

[24] The reason that the threshold should be limited in this manner is simply because it is far too presumptuous of this court to expect the common and ordinary man to be endowed with in-depth intricacies of the law and the

refined knowledge that of a legally trained officer of the court, either from the bench or even from the bar. A

[25] This court takes great guidance from the English House of Lords in the case of *Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151: B

> There is no doubt that in actions for libel *the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower* and he is *not inhibited by a knowledge of the rules of construction*. So he can and does read between the lines in the light of his general knowledge and experience of world affairs. C
>
> What the ordinary man would *infer without special knowledge* has generally been called the natural and ordinary meaning of the words.

[26] This landmark decision was similarly upheld at home here by the Federal Court in the case of *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300: D

> The steps of the inquiry before the court in an action for defamation was succinctly explained by Gopal Sri Ram JCA (later FCJ) in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 (CA) at pp 374–375: E
>
> > It cannot, I think, be doubted that the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning.
> >
> > The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning, of words (see *Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction ... F G

[27] Thus, it is pertinent to keep in mind that the interpretation and analysis of the words so used must not be done with a fine tooth legalistic comb. To deliberate and consider evidence of facts surrounding the statement is well within the court's duty but at no point in time can any party expect proof or evidence to the extent of proving or disproving a criminal offence or a civil wrong. A defamation court is neither the proper forum or arena to deliberate the elements of a crime or a civil wrong (other than the alleged defamation so pleaded). H I

[28] Having the proper threshold in mind, then this court can proceed to

analyse the words used in the impugned article published by the plaintiff. It is well-established and trite law that the three rudimentary elements to prove a statement to be defamatory are as follows (see Federal Court in *Mkini Dotcom Sdn Bhd & Ors v Raub Australian Gold Mining Sdn Bhd* [2021] 5 MLJ 79; *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321):

(a) the words are defamatory;

(b) the words refer to the plaintiff; and

(c) the words were published to a third party(ies).

[29] This court certainly appreciates and is mindful that the defendant in his submission has readily conceded on the latter two elements (being the reference to the plaintiff, and publication). The defendant's frankness and candour most certainly have saved this court's and even the plaintiff's time and resources from unnecessarily toiling on these two elements. Thus, this court ultimately can focus its deliberation into analysing and interpreting the words so used in the impugned article.

[30] In essence the plaintiff takes serious issue with the following paragraph of the impugned article ('impugned statement'):

> Apandi, who was appointed attorney-general in July 2015 when Abdul Gani Patail was summarily sacked from his office when it word went around that Gani was preparing to charge Najib with corruption, *should explain why he aided and abetted in the 1MDB scandal*.

[31] Even more specific, the plaintiff contended that the words, 'aided and abetted' naturally and literally carries with it a defamatory imputation which would tarnish his image and reputation in the eyes of right thinking members of the society, and would expose the plaintiff to ridicule, hostility, and contempt (see *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; [1973] 1 LNS 146).

[32] Nonetheless, in the realm of defamation law, the rule of interpretation becomes more complex in the instance that the alleged defamatory statement is capable of multiple meanings and different interpretations considering the facts and circumstances surrounding the alleged defamatory statement.

[33] Of course, if a minted coin itself has two faces, what more the colourable and widely interpretative nature of words. For example, if one were to say a person 'sees red', the extreme interpretation of it would mean that the person is seething with anger or rage. On the other hand, it could equally mean that the person aligns himself to the color and flag of a political ideology. And even lesser than that interpretation, it might just mean that the person sees the

color red. Thus, depending on the context, facts, and circumstances surrounding the alleged defamatory statement, the statement may carry with it varying degrees of libellous or slanderous imputations. In fact, the lesser meaning might not even be defamatory *in limine.*

[34] And this is exactly the pleaded case of the defendant. The defendant contends that the impugned statement is capable to be ascribed a 'lesser meaning' which is less extreme, and more reasonable given the facts and circumstances of the case. In para 4.4 of the defendant's defence, the defendant purported that the impugned statement is capable of being ascribed the lesser meaning of:

> That the Plaintiff had assisted the perpetrators of the 1MDB scandal by lending himself to the cover-up of wrongdoings and had thereby abused his role as the Attorney General.

[35] In essence, the defendant contends that short of or instead of the extreme legalistic interpretation of the commission of the criminal offence of 'aiding and abetting' (as in the offence itself in the realm of criminal law), the impugned statement can also carry the lesser meaning that the plaintiff has by his actions and omissions as the Attorney General has wrongfully exonerated or absolved the perpetrators of the 1MDB scandal and thereby provided a cover-up to mask or fashion the same scandal to be something altogether benign or lawful (as in the fantastical multi-billion ringgit lawful 'donation' by the still-unnamed Saudi Royalty).

[36] The colourable and variable nature of the 'sting of libel' has been addressed in the landmark commonwealth decision of *Chase v Newsgroup Newspapers Ltd* [2002] EWCA Civ 1772 ('Chase') in which the court there has propounded the *Chase* Levels principle. The court in *Chase* essentially propounded that a defamatory statement may carry with it three defamatory imputations of varying degrees. Level 1 being the extreme imputation that the plaintiff has indeed committed a serious act, Level 2 being the milder imputation that there are justifiable grounds to suspect that the plaintiff has committed the same act, and lastly Level 3 being the lesser imputation that there are grounds that the plaintiff ought to be investigated for the probable commission of the same act.

[37] The identification of the proper *Chase* Level is pertinent as different *Chase* Levels will later (in the second tier of the exercise) determine the degree or threshold of justification required for the defendant to succeed in a defence of justification. The entire principle and machination of the *Chase* Level principle has been astutely digested by S Nantha Balan J (now JCA) in the case of *Khairul Azwan bin Harun v Mohd Rafizi bin Ramli* [2017] 9 MLJ 205:

A [96] Following the case of *Chase*, it is now settled that:

(a) words may be capable of meaning the claimant has in fact committed some serious act ('*Chase* level 1 meaning');

(b) alternatively the words may mean that there are reasonable grounds to
B suspect that the claimant has committed such an act ('*Chase* level 2 meaning'); and

(c) a third possibility is that the words may mean that there are grounds for investigating whether the claimant is responsible for such act ('*Chase* level 3 meaning');

C [97] Thus the approach and proof of the defence of justification in respect of each of the different levels of meanings is different:

(a) in a *Chase* level 1 meaning where the allegation is made with the highest degree of certitude then the imputation of guilt must be defended;

D (b) in a *Chase* level 2 meaning where the allegation is 'reasonable grounds to suspect' the Court of Appeal in *Musa King v Telegraph Group Ttd* [2004] EWCA Civ 613 at paras 22–23 held a defendant has to prove the primary facts and matters giving rise to the reasonable grounds of suspicion objectively judged which includes the application of the conduct rule, the
E repetition rule and several odier principles known as 'the Musa King principles'; and

(c) in a *Chase* level 3 meaning — the lesser imputation that there are grounds for investigation — the defendant is entitled to succeed upon proving that such grounds exist. The English Court of Appeal in *Jameel*'s case paras
F 29–30 held that grounds for enquiry/investigation do not have to be shown to be 'objectively reasonable' as the point of the investigation is to discover whether they are so. The *Musa King* principles do not apply to the defence of justification under this *Chase* level 3 meaning (see *Gadey on Libel and Slander* (12th Ed) para 11.13 pp 407–410).

G **[38]** Before this court identifies the applicable *Chase* Level in the present case, it is preliminarily important for this court to identify the actual 'visage' of the 'serious act' which the plaintiff was claimed to have committed, suspected to have committed, or ought to be investigated of.

H **[39]** Apart from the lesser meanings discussed under the *Chase* principle, the Malaysian court has also discussed the ascribing of lesser meanings in the sense of the 'act' itself and not yet even the degree of 'committing' the act. This was exactly the exercise conducted by the Nantha Balan JC (now JCA) in the case
I of *Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin* [2016] 6 MLJ 226:

> [80] Having looked at all the words uttered during the political speech that was allegedly made by the defendant on 20 February 2008, *I am inclined to agree with the submissions made by learned counsel for the defendant that the more severe imputation of homosexuality does not preclude the lesser meaning* which has been ascribed to the

impugned words as per para 8(1), (2) and (3) of the proposed re-amended defence. Here it is relevant to keep in mind that the occasion was a political campaign and in the Malaysian context the object of any political speech/campaign would be to show the opponent or the opposing party in bad light and to debunk him/her or the party as a suitable candidate or party as the case may be.

[81] The impugned words are, 'DAP main PAS dari kanan, PAS main DAP dari kiri, *Anwar main dua-dua dari belakang*' and it is my view that these words, when viewed in context of the speech that was made and when set against the backdrop of the occasion when it was made (during a hotly contested political campaign), *can also mean or imply that the plaintiff has a tendency to 'betray or play out his political partners or allies'.*

[40] With all the above precedents in mind, this court finds that the plaintiff's strict and legalistic interpretation of 'aiding and abetting' (as a criminal offence) is far too extreme and far-fetched for the reasonable comprehension of the ordinary man who is without the special knowledge of criminal law.

[41] The plaintiff's reference and insistence on the legalistic definition of 'aiding and abetting' (as a criminal offence) under the *Black's Law Dictionary* and the Malaysian Penal Code is utterly extreme and improper. It is far too presumptuous for this court to assume that the natural instinct and reaction of the common Malaysian is to automatically peruse a Law Dictionary and to consult the Malaysian Penal Code. Clearly a Law Dictionary and the Malaysian Penal Code is not a common feature to be casually discussed within the general day-to-day goings-on and worldly affairs of the ordinary Malaysian.

[42] This court takes heed of the appropriate threshold as highlighted in *Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151 in that this court cannot assume that the ordinary Malaysian lives in an 'ivory tower' readily endowed with in-depth knowledge of criminal law and procedures.

[43] Thus, this court is in agreement with the defendant that the impugned statement ought to be ascribed the lesser meaning that the plaintiff has by his acts or omission (during his tenure in the office of the Attorney General) absolved and exonerated the perpetrators of the 1MDB scandal (SRC included) and consequently covered up the same scandal.

[44] Therefore, the plaintiff's fervent insistence on the absence of criminal prosecution, criminal commission, or criminal conviction of the plaintiff (on the criminal offence of aiding and abetting) is entirely unhelpful to prove the plaintiff's case, and is also entirely irrelevant to dispute the defendant's defence. To insist such strict legalistic interpretation would only force this court to go

beyond the scope of a defamation case, and transcend over into an entire exercise of criminal prosecution of a criminal offence (which is thoroughly improper).

[45] Having properly identified the 'serious act', this court can now proceed to identify the *Chase* Level that is attributable to the impugned statement. From this court's comprehension, the impugned statement can essentially be dissected into two limbs. The first half being a 'beckoning' or an 'invitation' for the plaintiff to avail himself to explain: 'Apandi ... *should explain* ...'. The second half thereafter being the hypothetical commission of a certain act: '... *why he aided and abetted in the 1MDB scandal*'.

[46] In the circumstance when the impugned statement carries with it the above two limbs (ie beckoning for an explanation for the hypothetical commission of the impugned act), then the impugned statement can only carry at best, a *Chase* Level 3 imputation. This court finds astute wisdom in Nantha Balan J's (now JCA) ratio decidendi in *Khairul Azwan bin Harun v Mohd Rafizi bin Ramli* [2017] 9 MLJ 205:

> Saudara Khairy Jamaluddin *perlu tampil ke hadapan memberi penjelasan bagaimana individu-individu vang berkaitan dengan pimpinan Pemuda Umno telah terlibat dan berkait dengan skandal ini.* Maklumat yang diberikan kepada saya menyatakan bahawa mereka ini terlibat sebagai pengatur kepada urusniaga-urusniaga ini dan berkemungkinan mendapat keuntungan dari urusniaga ini — maka wajarlah Saudara Khairy Jamaluddin member! penjelasan yang sebaiknya.
>
> [101] Thus the imperative question is whether the fourth paragraph bears the defamatory meaning that the plaintiff is, inter alia, guilty of corruption or abuse of power as stated in para 9 of the statement of claim. *No doubt the defendant has named the plaintiff as one of those who should come forward and render an explanation for the transactions.* But the issue is whether the impugned words convey to the hypothetical reader that the plaintiff is guilty of corruption or abuse of power or whether as contended by the defendant, it merely suggests that there are reasonable grounds for investigations to be carried out and for the plaintiff and the Head of UMNO Youth, Khairy Jamaluddin to come forward and give an explanation on the matter. In this regard, I have given the issue much consideration and thought and the conclusion that I have reached is that the fourth paragraph of the press release/impugned words *does not convey any of the meanings as ascribed by the plaintiff in para 9 of the statement of claim.*
>
> [102] *On the contrary, the lesser meaning or the Lucas-Box meaning that was ascribed by the defendant as per paras 6–7 of the defence more readily resonates* with the meanings that are to be culled from the impugned words. Taking the press release as a whole, *I find that there is no imputation that suggests that the plaintiff is guilty of corruption or abuse of power rather it suggests that there are reasonable grounds for investigations to be conducted and that the plaintiff, who is politically or commercially connected or affiliated to some of the individuals named in the press release, should come forward and render an explanation* as regards the property transactions.

[47] Similar to the present case, the plaintiff was specifically named and beckoned to avail himself to explain his disposition and his alleged cover-up of the 1MDB scandal (just as Khairy Jamaluddin was specifically called out for an explanation of his alleged proximity and involvement in a scandal involving UMNO). Thus, it is equally possible to ascribe the lesser meaning that there are reasonable grounds for investigations to be conducted and for the plaintiff to come forth and give his explanation on the matter.

[48] Of course this court is minded that it is extremely unsavoury to a person's constitution and reputation to merely be linked to the grotesque 1MDB scandal, but not all commentary to that effect automatically conveys the extreme meaning that the person so linked is guilty of an offence or guilty of the act so alleged. Neither would such commentary automatically be an actionable defamation. Especially in cases where the statement calls for and gives room for an explanation, then the statement is not at all an unshakeable or unwavering statement of fact, and equally can be a call for inquiry or investigation.

[49] Thus, with the 'act' itself appropriately identified and the appropriate Chase Level imputation determined, this court is of the preliminary finding that the impugned statement is at most capable of the lesser defamatory meaning of:

> There are reasonable grounds for the plaintiff to be investigated for his actions or inactions during his term as Attorney General, which may have provided a cover-up for the 1MDB scandal, and the suspected persons involved in the same scandal.

[50] Is the lesser meaning ascribed above defamatory still? This court answers in the positive that it is defamatory. Indeed, the statement still carries with it a libellous sting, albeit a lesser one (although definitely not the commission or guilt of a criminal offence the plaintiff insists it to be).

D. PRELIMINARY ISSUE ON THE IRRELEVANCY AND SCOPE OF THE APPELLATE COURTS' DISMISSAL OF THE MALAYSIAN BAR'S BID TO REVIEW THE PLAINTIFF'S REFUSAL TO PROSECUTE NAJIB RAZAK

[51] Before this court proceeds with the second tier of the exercise, this court must first address the plaintiff's avid stance to claim non-justiciable and non-reviewable 'authority' in exercising his discretion as the then Attorney General (particularly his perplexing refusal to prosecute Najib Razak under art 145 of the Federal Constitution, and his refusal to seek mutual legal assistance from international agencies to investigate the 1MDB scandal under s 8(2) of the Mutual Assistance in Criminal Matters Act 2002).

[52] This stance was fervently contended to the extent as if the plaintiff insists that nobody may scrutinise or question his actions and prerogatives during his tenure as the Attorney General. And the plaintiff placed avid reliance on Hanipah bt Farikullah J's (now JCA) decision in *Bar Malaysia v Peguam Negara Malaysia & Anor* [2016] MLJU 1597 which was also affirmed by the Court of Appeal and even the Federal Court.

[53] Nonetheless, this court must highlight that the plaintiff's reliance on this case is sorely misplaced. Of course it is not this court's intention to challenge or override this decision, but it is absolutely pertinent for this court not to lose sight of two facts. The first fact being that the judicial review was decided on a technicality and was never decided on its merits. Thus, the legality or correctness of the plaintiff's refusal to seek mutual legal assistance and refusal to prosecute Najib Razak was never tested and was never tried. This is obvious from the reported decision itself:

> Based on the above reasons in my view, strong reasons exist for this court to dismiss the applicants' application at this *preliminary stage without proceeding to the hearing of the substantive issue.*

[54] The second fact being, the non-justiciability or non-reviewability of the plaintiff's prerogatives is by no means any bar or restraint against public scrutiny, dialogue, investigation, or commentary. There is no nexus whatsoever between the people's right to criticise or question the plaintiff's prerogatives and the non-justiciability or non-reviewability of the plaintiff's prerogatives in court. The plaintiff by all means cannot fashion this decision as suit and armour to reign supreme and to act with impunity.

[55] Even if the Attorney General's prerogatives are non-justiciable and non-reviewable in court, it does not at all mean that those prerogatives cannot be scrutinised in the public sphere. Of course no Attorney General ought to be judicially enforced to act in any manner, but nevertheless, the manner in which he so exercises the same prerogatives and discretion shall remain open to be questioned and be criticised. If not then the Attorney General's power would be absolute, and elementary jurisprudence already tells that absolute power can corrupt absolutely.

[56] Thus, since the court here is not moved, and in fact cannot be moved to review and force the Attorney General to exercise his discretions, therefore, it still remains within this court's discretion to consider facts and evidences to deliberate on the plaintiff's actions and inactions, at the very least to determine the fairness, truth, and justifiability of the defendant's impugned statement.

E. PRELIMINARY ISSUE ON THE SCOPE OF FACTS, EVENTS, AND EVIDENCE THAT THIS COURT CAN CONSIDER

[57] Much has been argued (especially by the plaintiff) that supposedly this court can only determine the defendant's defence based on the facts available at the material time the impugned statement was published. In fact, during trial the counsel for the plaintiff had raised an objection to the reference to the reported case and grounds of judgment of Mohd Nazlan J's (now JCA) decision in the prosecution and conviction of Najib Razak regarding the 1MDB scandal (specifically the part of the RM42m syphoned into Najib Razak's personal account transferred from SRC International Sdn Bhd ('SRC')) (see *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808).

[58] The learned counsel for the plaintiff argued that it is not open for the defence to prove justification referring to facts, evidence, or decisions that were only revealed or found as of recent. The learned counsel for the plaintiff contended that the defence is limited to only refer to matters, facts, evidence or documents which were available at the time when the defamatory statements were published.

[59] This court must emphasise the danger of this assertion. Considering that the court shall be the arbiter and beacon of all that is just and fair, it is absolutely pertinent that the courts be afforded and presented with all evidences, facts, and circumstances to allow a proper and complete determination of a case. So long as all the evidences, facts, or circumstances were tendered into court through the appropriate channels and procedures, there should not be any bar or restriction imposed against the court to be kept fully abreast and informed of the facts of the case.

[60] What the learned counsel for the plaintiff is contending is akin to asking this court to turn a blind eye, or to put a blindfold on against issues, facts, evidence, or circumstances which are readily available to the court at this time.

[61] The defence's pleading is to prove justification, fair comment, privilege or some degree of truth in his statement. Any evidence, facts, circumstances which is probative or relevant to prove or disprove the defendant's defence remain probative or relevant notwithstanding the fact that such evidence, facts or circumstances occurred before, during or even after the publication of the alleged defamatory statement.

[62] It would be unbecoming for this court to simply close its eye to subsequent established truths or facts, especially if the subsequent truths or facts were exactly the same facts which were raised or alleged within the

defamatory statement. And this is exactly the circumstance in the present case. Najib Razak was prosecuted and later convicted for the same crimes which the plaintiff personally exonerated and absolved Najib Razak of (during his reign as Attorney General). The turn of events is too inextricably woven to ignore and is too uncanny to be passed off as mere coincidence.

[63] Of course, this court is minded that the margin of admissibility of subsequent events is considerably narrow in view of the statutory operation of s 43 of the Evidence Act 1950. Nonetheless, that is not to say that there have not been precedents which held that subsequent events can be admissible in a defamation case. Again, valuable guidance can be found in Nanthan Balan J's (now JCA) decision in *Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin* [2016] 6 MLJ 226, in which His Lordship has insightfully digested the current literature regarding the admissibility of subsequent events in the framework of defamation law:

> In *Gatley's* (12th Ed) — para 11.10, the learned authors opinion on the relevance of evidence of events subsequent to publication is as follows:
>
> *Evidence subsequent to publication.*
>
> What evidence can be adduced before the court is dependent on the nature of the imputation that has been published? Most commonly, perhaps, a general charge against character may be justified by subsequent events, so that 'if a libel accuses a man of being a 'scoundrel, *the particulars of justification can include facts which show him to be scoundrel, whether they occurred before or after the publication*'. But even where the charge is specific, it is submitted that evidence of matters arising after the date of publication may be admissible to justify it, as for example evidence of similar facts. In other circumstances, an imputation may be proved only by reference to the facts as they were at the time when it was published.
>
> In *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407 the court discussed the question of admissibility of subsequent events in the following passage:
>
> *Those cases show that, in order to prove that the words are true, particulars can be given of subsequent facts which go to support the charge.* Thus, if a libel accuses a man of being a 'scoundrel', the particulars of *justification* can include facts which show him to be a scoundrel, whether they occurred before or after the publication. Such particulars are admissible because they enable him to know the case he has to meet and open the way to discovery.

[64] In fact, His Lordship also highlighted that there have been many cases which have held that criminal convictions are admissible in civil proceedings:

> However, there are also cases which have ruled that criminal convictions are admissible in civil proceedings. See:
>
> (a) *Ramanathan Chelliah v Penyunting, The Malay & Anor* [1996] 2 MLJ 538; [1998] 2 CLJ 691 at pp 694–695 (HC);

(b) *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [1999] 4 MLJ 58 at pp 66–67; [1999] 7 CLJ 32 at pp 37 and 39 (HC);

(c) *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 1 MLJ 305 at p 310 ; [2001] 1 CLJ 519 at p 523(CA);

(d) *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65 at pp 67; [2001] 1 CLJ 663 at pp 665–666(FC);

(e) *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad* [2007] 5 CLJ 118 at pp 124 (HC).

[65] All of the above considered, His Lordship astutely concluded that at least in the realm of the defence of justification, subsequent events remain admissible, so long as the subsequent events are proximate and consanguineous to the facts raised within the impugned facts within the defamatory statement:

> It is fair to conclude that *for justification there appears to be only a narrow scope for a defendant to rely on subsequent events* but there must necessarily be a causal connection between the impugned words and the occurrence of the subsequent event so as to make it connected and relevant.
>
> ... in certain narrow and limited circumstances, *evidence of subsequent events may be allowed for purposes of the plea of justification,* but this will depend very much on the facts. Most certainly *there must be some degree of consanguinity and proximity of time between the impugned events and the subsequent events.*

[66] Similar here, this court must reiterate that the subsequent event of Najib Razak's conviction is *vividly consanguineous* and proximate to the impugned event that the plaintiff has previously absolved and exonerated Najib Razak of the same exact criminal offence he was later found guilty of (during the plaintiff's tenure as the Attorney General). It is so much inextricably woven that it is as though it was of the same series of events and transaction of investigation, exoneration, prosecution, and finally, criminal conviction of Najib Razak over the same exact charges involving SRC and the 1MDB scandal.

[67] This court also finds guidance in SM Komathy Suppiah J's decision in *Tan Sri Dato' Seri Dr M Mahadevan v Dr Jeyaratnam s/o Mahalingam Ratnavale* [2015] MLJU 1998:

> I see no merit in this submission. *There is no rule that I know of that postulates that a defendant cannot rely on subsequent events to demonstrate that the words complained of in a defamation action are true. These court judgments essentially confirm and corroborate and vindicate the allegations the defendant made* in 2002 about irregularities committed by the plaintiff in the course of the discharge of his duties as executor. These judgments bear out right the allegations in the letter dated 2 May 2002 and exonerate the defendant.

A On the evidence, *I am satisfied that the defendant has proven the plea of justification* on a balance of probabilities.

[68] The learned counsel for the plaintiff also objected and contended that the defence's reference to Mohd Nazlan J's SRC decision is akin to re-litigating B or opening up the SRC trial again.

[69] This court has to disagree to this objection and contention. As far as this court is concerned, Mohd Nazlan J's SRC decision remains standing (especially since it was affirmed by the Court of Appeal). Indeed, this court understands C that this proceeding is not a forum to re-litigate the truth or falsity of the SRC decision but nonetheless, this court is the exact appropriate forum to determine whether there is any degree of truth or falsity in the defendant's alleged defamatory statement against the plaintiff. As far as this court is concerned, the D mere alluding to the SRC decision does not necessarily or automatically mean that the defendant is unraveling the SRC trial and decision. On the contrary, unraveling and undoing the SRC decision would only detriment the defendant's case and benefit the plaintiff instead.

E **[70]** As far as this court is concerned, the defendant thus far has alluded to the SRC case and decision only as part of his facts and evidence to prove his pleaded defence of justification. Not to dispute or to re-litigate the SRC trial. It is pertinent to remember that the fantastical donation is also part of the plaintiff's own pleaded case. Thus, it would be well within both parties' rights F to put evidences and for this court to appreciate those evidences regarding the truth or falsity of the fantastical donation.

F. THE SECOND TIER EXERCISE: DETERMINING THE DEFENDANT'S PLEADED DEFENCE — WHETHER OR NOT THE IMPUGNED STATEMENT IS JUSTIFIABLE, FAIR COMMENT, TRUTHFUL, OR PRIVILEGED

G

[71] Classically, the elements to succeed a defence of justification has been elucidated by the Court of Appeal in *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242: H

> Again, perhaps we should go back to what in essence is required to be established by a defendant who is desirous of putting up a defence of justification in facing up a defamation suit. In relying on *the defence of justification the burden of proof is on the defendant to prove that the allegations made are true or are substantially true.* The I defendant must prove it on the balance of probabilities, that is, the allegation is more likely than not to be true.

[72] In essence, the defendant at the very least must satisfy this court that the imputations are 'substantially true' (not necessarily the absolute and whole

truth). Thus, keeping in mind the applicable *Chase* Level 3 in the present case, the defendant must satisfy this court that there are reasonable grounds that the plaintiff ought to be investigated for his actions or inactions during his term as Attorney General, which may have provided a cover-up for the 1MDB scandal, and the suspected personalities involved in the same scandal.

[73] Having established the evidential threshold that the defendant must satisfy, this court shall now proceed to delve into the numerous evidences the defendant has proffered into this court. In essence, the evidences and events that the defendant has furnished into the court are, inter alia:

(a) the plaintiff's perplexingly 'magnanimous' decision to exonerate Najib Razak and his bewildering acceptance of the existence of the fantastical 'donation' by the unnamed Saudi Royalty even at the face of the fact that RM42m was already known to have been transferred from SRC's account (and not any Saudi Royalty account) to Najib Razak's personal account;

(b) the plaintiff's astoundingly indifferent, evasive, deceptive, and lackadaisical attitude in pursuing the truth behind the fantastical donation by the unnamed Saudi Royalty;

(c) the plaintiff's audacity to close investigations (NFA/KUS) although not having properly confirming any actual particulars and evidence of the fantastical donation by the unnamed Saudi Royalty, and while being aware that RM42m was transferred into Najib Razak's personal account from SRC's account; and

(d) the plaintiff's baffling refusal either to accept or offer mutual legal assistance from the Swiss Attorney General and the United States Department of Justice to investigate the 1MDB scandal (to trace monies siphoned out of the Malaysian jurisdiction).

F(i) The plaintiff's perplexingly magnanimous decision to absolve and exonerate Najib Razak and to prefer the fantastical narrative of an unproven donation

[74] To this court's contemplation, this issue (when put to trial and cross-examination) is the most telling and revealing evidence of the plaintiff's overt and sheer disinterest, disassociation, and indifference to elementary rule of law, and even common sense. Although with utmost respect, this court is pressed to express its disdain to the sordid extent of the plaintiff's self-contradictory testimony, evasiveness, and outright untruth.

[75] It is not exactly rocket science to appreciate that the issue of the RM2.6 billion (which the plaintiff hastily declared a donation) would be the core and the fulcrum in which the plaintiff's very own case swings and tilts by. It would be a grave remiss if the plaintiff were to avail himself to this court

without being candid and without being fully equipped to the brim to justify his magnanimous decision to prefer the donation narrative and to exonerate Najib Razak.

[76] But unfortunately, this was exactly the case for the plaintiff's evidence both documentary (or grave lack thereof) and *viva voce* testimony during cross-examinations.

[77] As a starting point, this court was referred to the infamous press conference on 26 January 2016 ('press conference') in which the plaintiff read the Media Statement entitled 'Kenyataan Media-Berhubung Kertas Siasatan Kes SRC International dan RM2.6 Billion yang dikemukakan kembali oleh SPRM' dated 26 January 2016 ('the impugned press statement').

[78] The impugned press statement essentially was the plaintiff's own decision and finding upon being presented numerous investigation papers from numerous task forces which were set up specifically to investigate the 1MDB scandal (which also includes the RM42m siphoned from SRC and transferred into Najib Razak's personal account ('SRC Monies')). It is well known in the public domain, and in fact in evidence before this court, that MACC and other task forces recommended criminal charges or at the very least further in-depth investigation into the fantastical donation and the SRC monies. As a response to those recommendations, the plaintiff still preferred the donation narrative and essentially made the following findings and statements of fact:

(a) based on the documents, witnesses' testimonies presented upon the plaintiff by MACC, it is evident that the RM2.6 billion paid into Najib Razak's personal account *WAS A DONATION* (without consideration) from the Saudi Royal Family;

(b) MACC itself has *met and recorded statements* from witnesses *INCLUSIVE OF THE DONOR who had confirmed that the monies were donated to Najib Razak privately*;

(c) the plaintiff was satisfied that there is *NO NECESSITY TO SEEK MUTUAL LEGAL ASSISTANCE TO COMPLETE INVESTIGATIONS* considering there is no criminal wrong; and

(d) there is no criminal wrong in the transfer of the RM42m from SRC to Najib Razak's personal account.

[79] Now, this court is beckoned to address the first obvious untruth in the plaintiff's impugned press statement. In the impugned press statement, the plaintiff brazenly and confidently announced that the plaintiff's own delegation has flown to Riyadh and *personally met the alleged donor himself and*

recorded the donor's own personal confirmation of the donation. Nonetheless, this confident statement is in actuality, untruthful. On the extreme contrary, the plaintiff has outright contradicted and negatived his own press statement and admitted that his delegation *DID NOT EVEN MEET NOR SPEAK TO THE ALLEGED DONOR.* In fact, in total contradiction to the impugned press statement, the plaintiff readily admitted that the delegation had failed to record any statement or verification from the donor:

> RS: And you agree that the delegation returned to Malaysia and reported to you that *THEY FAILED TO GET SUCH STATEMENT OR VERIFICATION OF THE SAID 4 LETTERS FROM THE SAID PRINCE SAUDI,* you agree?
>
> PW1: Yes.
>
> RS: In fact Tan Sri, the said *DELEGATION COULD NOT CONFIRM IF THEY ACTUALLY MET PRINCE SAUDI* during the trip, you agree?
>
> PW1: I was make to understand that *PRINCE SAUDI REFUSED TO MEET ANYBODY.*

[80] And this is exactly one of the many reasonable grounds to support the plaintiff's imputation that the plaintiff ought to be investigated for absolving Najib Razak and covering-up the scandal. The contradiction is not merely an error but instead a total contradiction. And it is indeed suspicious and reasonable to ponder the necessity to be deceptive about the critical proof of the alleged donation by the Saudi Royal Family. Why would the Attorney General bend the truth about meeting and recording a statement by the alleged donor? Why would the Attorney General declare to the world that his delegation has met the donor (and obtained confirmation from the donor) while it was well within his knowledge that his delegation did not even speak or meet with the 'fabled' donor? On this score alone, it is glaringly obvious that the defendant's impugned statement is justified. Just for the plaintiff's untruth about actually meeting the donor, it poses critical questions and grounds for the plaintiff to explain himself under an investigation.

[81] To make matters worse, this court is utterly confounded by the plaintiff's testimony admitting to adopting the donation narrative as a whole, although in gross absence of direct evidence, and in preference to 'low-hanging fruits' of his delegation's hearsay evidence. It is right there in the plaintiff's own testimony that he exhibited a plain, disinterested, evasive, and disassociated attitude to investigate the donation further, and the plaintiff incessantly preferred to simply depend on his own delegation's word of mouth. The plaintiff did not care at all to even remember the particulars or even the name of the alleged 'representative' his delegation had allegedly met in Riyadh:

> PW1: Prince Saudi refused but other official did give evidence to the MACC
>
> RS: Other official?
>
> PW1: Yes.

A ...

RS: And the person who was supposed to give a statement to the delegation, *who was he*?

PW1: *I CANNOT REMEMBER* but I was informed that he presented the Prince himself, he speaks on behalf of the Prince.

B

RS: Did he provide any remittance document for example bank transfers and so on which would be in his possession or the possession of the Saudi royal family if it was who that such donation was made? *DID HE PROVIDE SUCH SUPPORTING DOCUMENTS TO THE DELEGATION TO SUPPORT OR CORROBORATE THIS STATEMENT?*

C

PW1: *I WOULDN'T KNOW.*

[82] Not only that, this court is indeed perplexed by the plaintiff's staunch insistence to not name the fabled Saudi Prince who he firmly believes to be the fabled or the famous donor. The memory lapse or even concealment of the donor's name has been a constant feature in the plaintiff's statements to the public at large, and is also a feature in the plaintiff's testimony before this court. For the plaintiff to stake a case on the alleged truth of the donation, it is entirely bizarre that the plaintiff is not 'in-the-know' of at least the name of the fabled donor:

D

E

RS: Fair enough. I'll take you to what has said by Justice Mohd Nazlan on this issue. Paragraph 163 Yang Arif, if I may quote Yang Arif, before that Yang Arif, I'll come to this in a short while. Now Tan Sri, again I would like to ask you a few questions on Riyadh trip. The Riyadh trip Tan Sri, was to meet a certain Prince isn't it? Was there a certain Prince, who was the donor of this donation? Who was the purported donor of this donation Tan Sri?

F

PW1: *I cannot remember the name but it's just the royal Saudi Arabia family.*

RS: Tan Sri, you cannot remember the name.

PW1: Yes.

G

RS: *You cannot remember the name of the person who donated RM2.6 billion to the former Prime Minister?*

PW1: *Yes.*

RS: You are coming to Court knowing that this is going to be a central issue before this honorable Court isn't it? It's your pleaded case. You yourself plead and rely on this donation.

H

[83] Again, it is suspicious and reasonable to ponder on the manner and method the plaintiff hastily adopted the donation narrative considering that the plaintiff himself as the Attorney General does not even care to remember or to know the name of the fabled donor (which is obviously a critical information for the investigation). If the Riyadh delegation, and the plaintiff himself does not know the name of the donor, then it is suspicious and reasonable to ponder how could the plaintiff even ascertain if the RM2.6 billion was paid by the

I

unknown donor? How can there be any meaningful analysis and investigation as to the source of the donation, if the name of the donor itself is unknown?

[84] Hence, again, these questions further justify the defendant's imputation that the plaintiff ought to be investigated. In fact, thus far the facts and evidence before this court even satisfies the justification in *Chase* Levels 1 and Level 2. The peculiar and questionable circumstances plaguing the plaintiff's decision to absolve Najib Razak, and hastily accept the donation narrative can equally give rise to suspicion of a cover-up, or the commission of the cover-up in and of itself.

[85] And when pressed further into his discrepancies, the plaintiff suddenly shifted and took an evasive and disassociated stance that he is not part of the delegation that went to Riyadh. The plaintiff suddenly staked this position although he readily admitted that *the delegation reports to him and presented their 'findings' when the delegation returned to Malaysia.* In essence, the plaintiff is part of the team even if he was not personally present in Riyadh. The team's entire wealth of (in actuality, lack of) evidence and information is equally imputable to the plaintiff's knowledge. If there were indeed evidences, then the plaintiff should also be aware of the same. Thus, if the plaintiff cannot produce such evidences, then the only viable conclusion is that there were no such evidences collected in Riyadh:

PW1: I wasn't part of the team.

RS: I know you are not part of the team *but the team reported to you isn't it upon their return to Malaysia?*

PW1: My Lady, this question should be asked to the team.

RS: The team met you isn't it when they return to Malaysia?

PW1: Yes.

[86] And at the peak of the plaintiff's disgruntlement, the plaintiff admitted that he decided to absolve Najib Razak, and accepted the donation narrative based on what the delegation told him. The plaintiff did not venture any further than this gross lack of documentary evidence and simply take the team's words at face value in total disregard of the sheer fabric of evidence law. Even a novice practitioner would know better than to simply rely onto hearsay evidence. It is truly suspicious and reasonable to ponder the plaintiff's urgent haste to adopt the donation narrative, even at the glaring fact of gross absence of probative evidence to prove the fantastical donation:

RS: So when they met you they told what happened in Saudi Arabia isn't it?

PW1: *They just came back and confirmed that those donation from the royal family, that's all.*

[87] The plaintiff's plain disinterest and cavalier attitude to verify the truth behind the alleged donation is apparent in his testimony here:

> RS: No. No. I am asking you have proved nothing before this Court or you have produced nothing by way of documents or any other records before this honourable Court to show that such a donation existed.
>
> PW1: *If you are saving that there are no documents SO BE IT.*

[88] If the earlier deliberations are not puzzling enough, it is infinitely more puzzling that the plaintiff, at the time of the press conference, was readily aware and readily admits that some of the monies were explicitly transferred from SRC (which is a former subsidiary to 1MDB) and was not at all a donation from any Saudi Royalty's accounts. During the said press conference, the plaintiff while explaining his decision to exonerate Najib Razak, has held two flowcharts, in which the flowcharts readily showed that monies were transferred into Najib Razak's personal account from SRC, and not any account of Saudi Royalty. This perplexing fact was even commented by Mohd Nazlan J, in His Lordship's reported decision of the SRC trial:

> [1638] There is also another aspect in the evidence given by DW14 that is of interest. DW14 testified that he decided to close the investigations against the accused as he was satisfied that the funds in issue were donations from the Saudi Royal family. DW14 also confirmed that the two flow charts he held up during his press conference on 26 January 2016 (P802 and P803) were the same as what could be seen in the coloured photograph of him at the press conference on the same day (P804). *Yet, both the flow charts (P802 and P803) showed the funds entering the accounts of the accused had originated from SRC, and not from any donation of the Saudi Royal family.*

[89] Even the plaintiff admitted the existence of the flowcharts he held during the press conference, albeit being evasive of the same:

> RS: Tan Sri, at the said press conference on the 26.01.2016 you had also and it is very widely published and I think we all can see in YouTube and so on, Yang Arif I'm not referring it here now but I think Tan Sri would agree that it is well publicised, Tan Sri had been seen holding 2 flowcharts. Do you recall that at that said press conference?
>
> PW1: Yes, I give the press conference.
>
> RS: *2 flowcharts, you had 2 flowcharts like this at the press conference. Remember that?*
>
> PW1: *Some chart lah, I don't remember flowchart or whatever it is, there was some chart.*
>
> RS: You can't remember many things today it seems Tan Sri.
>
> PW1: *No, I remember it's charts.*

[90] As this court is minded above, Mohd Nazlan J's findings of facts were already upheld and affirmed by the Court of Appeal. It is not open for this

court to re-litigate these facts but it is well within this court's jurisdiction to appreciate and consider these facts to determine the justifiability and truth of the impugned statement.

[91] Thus, considering the blatantly obvious knowledge of the monies siphoned from SRC to Najib Razak's personal account, it is suspicious and reasonable to ponder why the plaintiff as Attorney General would insist on accepting the donation narrative although the evidence in his own hands and knowledge indicated that the monies were paid from 1MDB's own former subsidiary, and not at all from any Saudi Royalty's account? Why would the plaintiff insist on not investigating the SRC monies further, although the SRC monies trail itself defeats the donation narrative? Time and time again, these questions justify the defendant's imputation that at least there are grounds to investigate and for the plaintiff to explain himself.

[92] The same baffling exoneration regarding the SRC monies were confirmed by Dato Lim Chee Wee ('DW6') who served as one of the eight panel members of the MACC task force entrusted to investigate the 1MDB scandal. DW6's statements were reported in an article dated 16 May 2018 aptly entitled 'MACC wanted to probe 1MDB Najib link but the A-G said no'. During examination-in-chief, DW6 confirmed that the quotes were indeed his own personal statements:

> SK: I will take you to the first article in Bundle B, would you like a moment to have a read of this Star online publication dated 16.05.2018.
>
> DW6: Yes, I, I refresh my memory.
>
> SK: You aware of this?
>
> DW6: Yes, I remember this article.
>
> SK: *Now in this article The Star online reports quotes several statements from you.*
>
> DW6: *Yes, My Lady.*
>
> SK: *Alright*.

[93] It was reported (and DW6 confirms) that DW6 also expressed the same bewilderment of the plaintiff's refusal to further investigate the transfer of the SRC monies into Najib Razak's account:

> A-G refused to investigate further despite evidence suggesting that Najib received directly or indirectly RM42mil from SRC.

F(ii) The plaintiffs audacity to close investigations (NFA/KUS) although not having properly confirming any actual particulars and evidence of the fantastical donation by the unnamed Saudi Royalty, and while being aware that RM42m was transferred into Najib Razak's personal account from SRC's account

[94] The plaintiff readily admitted within his own witness statement that upon convening with the Riyadh delegation, and deliberating the investigation reports from the numerous task forces, apart from exonerating Najib Razak, the plaintiff also marked the investigation to be 'No Further Action' or 'Kemas untuk Simpan' ('NFA/KUS'). Nonetheless, the plaintiff insisted that although he marked the investigation as NFA/KUS, he never intended to bar any further investigation by any other agencies and that the agencies can reopen investigation if in case there arise new evidences.

[95] On the contrary, and this court is inclined to agree, the defendant submits that marking of NFA/KUS means that the plaintiff has closed the investigation and had come to a conclusion. And this is exactly reflected in the plaintiff's press conference exonerating Najib Razak of any wrongdoing at the same time of marking the investigation as NFA/KUS.

[96] The true nature of NFA/KUS is *res ipsa loquitur* its own acronym. The acronym reads NO FURTHER ACTION. That means the plaintiff is satisfied that there is no necessity of further action as investigations has already concluded that there were no criminal wrongs committed by Najib Razak. And this is also reflected in the impugned press statement by the plaintiff:

> Berhubung perkara ini juga, saya juga berpuas hati bahawa *tiada keperluan* bagi Malaysia untuk membuat permintaan bantuan bersama dalam perkara jenayah (mutual legal assistance) kepada mana-mana negara asing *bagi tujuan melengkapkan siasatan jenayah yang diialankan oleh pihak SPRM memandangkan tidak terzahir apa-apa kesalahan jenayah berhubung sumbangan dana RM2.08 billion tersebut.*

[97] The passage above already reflects the plaintiff's ultimate position is that the investigation has already come to completion as the plaintiff believes that there are no apparent criminal wrongs in the fabled donation by the Saudi Royal Family. The plaintiff was so convinced of the investigation's completion that he feels that there is no necessity to seek for international mutual legal assistance.

[98] In fact, the phrase 'Kemas untuk simpan' is sufficiently telling that the plaintiff is satisfied and has concluded investigations. 'Kemas untuk Simpan' literally translates to 'arrange for storage'. Nothing in this term indicate any proactivity or meaningful pursuit of further investigation. On the contrary it screams of hasty and urgent closure and archiving of the matter.

[99] At the very least, plain logic and common sense would dictate that if indeed the plaintiff is so intent in allowing further investigation, then the plaintiff would not have hastily called for the press conference and conclude his findings to exonerate Najib Razak. How can the plaintiff insist that investigations have not come to a close, when he himself went onto announce

to the world that he has already come to conclusion that Najib Razak has done no wrong in receiving the gracious and most fantastical donation in the history of mankind? How can a conclusion come before closure of investigation? The answer is simply that it cannot. If the matter indeed was still under investigation, then there should not have been any conclusion drawn, and definitely there should not have been any press conference held for the plaintiff to lay down his decision for the world to see.

[100] In any case, it must be reminded that the plaintiff was no mere layperson and instead was the Attorney General of Malaysia. The Attorney General sits at the highest seat of the nation's prosecution agency. Even before the court can swing its gavel, it is the Attorney General's Chambers that brings criminals and their crimes into the light, and to sit before the courts to be adjudicated. It is entirely untenable and unthinkable for the Attorney General to adopt a disassociated attitude to divorce himself totally from any role in criminal investigations.

[101] It is truly unbecoming for the plaintiff as the then Attorney General to simply feign non-involvement and just leaves investigations *in toto* into the hands of other agencies. It is truly unthinkable for the plaintiff to insist on closing investigations and just wait or sit idly by for 'new evidences' to arise from another agency's investigation. The Attorney General must be proactive, fearless, and act zealously and vigorously in ensuring that no measure of corruption and crime should ever be left unchecked.

[102] And it is even more perplexing when the plaintiff's own witness testified that the plaintiff has insisted on concluding investigations although the plaintiff's own internal task force recommended for continued and further investigations.

[103] Muhammad Anas bin Mahadzir ('PW3') who is currently a sessions court judge, was previously a deputy public prosecutor subordinate to the plaintiff. In his testimony, he confirmed that he was indeed appointed to be involved in the team of prosecutors to peruse and examine the investigation papers and later make recommendations to the plaintiff.

[104] Interestingly enough, it was PW3's own testimony that around the third or fourth week of January 2016 (immediately before the press conference), he had recommended to the plaintiff that the matter should be further investigated. But instead, the plaintiff insisted to make his own conclusion and mark the investigation as NFA/KUS:

> RS: So as of the third or fourth week of January 2016 Tuan, would you agree that you had recommended on the task force you were a member of, recommended that this matter has to be further investigated?

PW3: Yes, Yang Arif I can confirm that.

RS: And you had of the task force, had perhaps you don't remember now like you had told us just now, had listed down a few things that you recommended, a, b, c. We recommend a, the investigation to carry out by doing a, b, c, d and so on. Would that be right?

PW3: That is correct, Yang Arif.

RS: And these were minuted in the IP?

PW3: That is correct, Yang Arif.

RS: And some of them, and some of those recommendations could have been included perhaps taking further statements and so on, would you agree?

PW3: I agree, Yang Arif.

RS: And would you agree Tuan, that those recommendations that were made by your task force, your team would have if there were acted upon, would have taken considerable amount of time to have been executed?

PW3: That is correct, Yang Arif.

RS: So for example, if one of the recommendations were to take statements from potential witness for example, would have to go and find them, locate them, take a statement, would take time few months perhaps.

PW3: That is correct, Yang Arif

[105] Thus, it was in the plaintiff's own evidence that the plaintiff had gone onto act against the recommendations of his own internal task force. The plaintiff's unrelenting resolve to exonerate Najib Razak (even against the recommendation of his own internal task force) further cast suspicion regarding his actions and inactions which lend a cover-up to the 1MDB scandal.

[106] The defendant's second witness, Datuk Bahri bin Mohamad Zin ('DW2') also confirmed that the plaintiff minuted that the investigation to be KUS. DW2 was the then Director of Special Operations of the MACC at the material time the task forces were investigating the 1MDB scandal. DW2 testified to explain further what KUS meant:

SK: Selepas Tuan telah merujuk kembali dengan minit-minit tersebut, apakah tindakan AG, Tan Sri Apandi Ali?

DW2: Fail tersebut dikembalikan semula dengan arahan KUS.

SK: KUS?

DW2: Ya.

SK: Apa maksud dia?

DW1: Kemas Untuk Simpan.

SK: *Apa maksud Kemas Untuk disimpan?*

DW2: *Kemas Untuk Simpan kebiasaannva ialah kita tutuplah kes itu kecuali ada saksi-saksi baru yang muncul kemudian kes boleh dibuka kembali.*

SK: So semasa arahan untuk KUS itu, *ada atau tidak arahan untuk sebarang siasatan lanjut atau isu-isu lain? Ada apa-apa arahan begitu?*

DW2: *Tidak ada.*

SK: Jadi Tuan selaku Pengarah ya, apakah tindakan Tuan atau reaksi Tuan kepada arahan untuk di KUS fail?

DW2: Saya merasa amat kecewalah oleh kerana kes very straight forward dan very strong, dengan izin.

[107] Indeed, DW2's testimony further corroborated the fact that the plaintiff merely closed the investigations and had not issued any proactive or meaningful instructions to investigate the matter any further. The plaintiff (even against the recommendations of the MACC and his own internal team of prosecutors) instead see it fit to conclude that there were no criminal elements in Najib Razak pocketing RM2.6 billion including the RM42m transferred from SRC's account.

[108] Even if this court were to indulge the plaintiff's position to wait for fresh evidences, this court cannot ignore the glaring peculiarity of the plaintiff's insistence to NFA/KUS the investigation at the face of gross absence and absolute lack of evidence to corroborate the donation narrative. This court is inclined to agree with the learned counsel for the defendant, that it is utterly inconceivable that the plaintiff would NFA/KUS the investigation at the face of the following facts:

(a) the overwhelming absence of evidence and the utter failure of the Riyadh mission. The investigation to verify the truth of the donation was even admitted by the plaintiff to be a failure. The plaintiff himself admitted that the Riyadh delegation not only failed to record any statement or evidence, the Riyadh delegation did not even manage to meet or speak with the fabled generous donor. The plaintiff could not even meaningfully recall or even particularise the alleged statements the Riyadh delegation had 'recorded'; and

(b) the plaintiff had marked the investigation NFA/KUS even against the recommendations of the MACC and even the plaintiff's own internal task force within the Attorney General's Chambers.

[109] The above considered, any person of sound mind would ponder the question, how could the Attorney General satisfy himself of the truth of the donation when his own delegation could not verify the truth of the fabled donation? Why would the Attorney General hastily NFA/KUS or close the investigation knowing full well that the Riyadh mission was an utter failure and

that his delegation had nothing to show to prove the truth of the fantastical donation? Why would the Attorney General insist on adopting the donation narrative when his own internal task force and even the MACC recommends at the very least, for further investigation, and in fact recommended charges against Najib Razak? The plaintiff's action in hastily closing and concluding investigations, and the plaintiff's inaction to meaningfully investigate the matter, indeed justifies the defendant's imputation that the plaintiff ought to be investigated for his conducts which may have assisted in the cover-up of the 1MDB scandal. In fact, the evidences justify the higher *Chase* Level 1 and 2 imputations that there might be grounds to suspect and there might be grounds to believe that the plaintiff indeed committed acts in covering-up the 1MDB scandal.

F(iii) The plaintiff's baffling refusal either to accept or offer mutual legal assistance from the Swiss Attorney General and the United States Department of Justice to investigate the 1MDB scandal (to trace monies siphoned out of the Malaysian jurisdiction)

[110] The plaintiff's dismissive attitude regarding mutual legal assistance was made clear as early as the press conference on 26 January 2016 at the same time the plaintiff exonerated Najib Razak of any criminal offence. It was readily announced in the press statement that the plaintiff believes that any mutual legal assistance of any foreign agency is unnecessary considering that the investigations concluded that there is no criminal element in Najib Razak receiving the RM2.6 billion donation (including the RM42m SRC monies) from the still-unnamed Saudi Royalty:

> Berhubung perkara ini juga, *saya juga berpuas hati bahawa tiada keperluan bag) Malaysia untuk membuat permintaan bantuan bersama dalam perkara jenayah (mutual legal assistance) kepada mana-mana negara asing* bagi tujuan melengkapkan siasatan jenayah yang dijalankan oleh pihak SPRM memandangkan tidak terzahir apa-apa kesalahan jenayah berhubung sumbangan dana RM2.08 bilion tersebut.

[111] It is reiterated that indeed this court respects the non-justiciability and non-reviewability of the plaintiff's prerogative (as the then Attorney General) to not seek for mutual legal assistance under s 8(2) of the Mutual Assistance in Criminal Matters Act 2002. Nonetheless, in the framework of defamation law, it is well within this court's jurisdiction and power to examine facts and circumstances surrounding the plaintiff's decisions, to determine whether or not the defendant's defamatory imputation is fair comment, justifiable, or privileged.

[112] Thus, as a starting point to this part of this court's deliberation, it is interesting and pertinent to highlight that the plaintiff himself during cross-examination, admitted that a localised investigation confined within the

corners of Malaysia would be futile and insufficient:

> SK: Now Tan Sri, as the AG of Malaysia at that time you had full discretion to seek mutual legal assistant, do you agree? I repeat myself. As AG at that time you had full discretion to seek mutual legal assistant from other jurisdictions?
>
> PW1: Agree.
>
> SK: *While knowing full well Sir that confining investigation to the 4 walls of Malaysia would be insufficient* while knowing that you during your tenure as AG refused to either seek assistance or to provide assistance to foreign investigating agencies. Do you agree or disagree?
>
> PW1: *I agree* but I have my reasons.
>
> ...
>
> SK: I'm putting it to you that without, forgive me, that bearing in mind that *investigation in relation to the money trails outside Malaysia is a critical element to the investigation* whether police or MACC or Bank Negara or any investigating agency in Malaysia. Mutual legal, *seeking mutual assistance was imperative to support local investigation, seeking mutual assistance was imperative to support, to bolster local police investigation, police or MACC. You knew that.*
>
> PW1: *Yes. I knew.*

[113] The only saving grace the plaintiff thought would absolve him for unreasonably refusing mutual legal assistance was the plaintiff's staunch insistence that a mutual legal assistance from a foreign government or agency 'would prejudice the local investigation'.

[114] The tenacity of the plaintiff to adopt self-contradicting stances is sublimely perplexing. How can the plaintiff agree that seeking mutual legal assistance is imperative to bolster local investigation, but at the same time and breath contradict himself and insist that the same mutual legal assistance would hinder local investigation? So the plaintiff himself cannot make sense of his own mind whether the mutual legal assistance is imperative or is it a hindrance. This tenacious insistence to adopt confusing and contradictory stances further blemishes the plaintiff's credibility as witness. The plaintiff was evasive until he could no longer evade the inevitable conclusion that he could not explain his reluctance to offer or accept foreign mutual legal assistance to shed appropriate light to unravel the 1MDB scandal.

[115] In fact, the plaintiff's purported concern of prejudicing local investigation, is squarely contradictory to his own eager insistence to close local investigation and NFA/KUS the matter entirely. The plaintiff's insistence to close investigations and to refuse mutual legal assistance is worryingly indicative of the plaintiff's disinterest to appropriately investigate the 1MDB scandal and effectively cover-up the scandal and personalities suspected to be involved in the scandal.

[116] The defendant led gruelling evidence that the plaintiff had refused to accept mutual legal assistance that was offered by the Swiss Attorney General. The Swiss Government's offer and the plaintiff's refusal of mutual legal assistance was reported in exh D6, an article dated 17 April 2019 entitled 'Our offer to help in 1MDB probe turned down, says Swiss envoy'. Exhibit D6 reported that the Swiss Ambassador Michael Winzap stated that the Swiss Government indeed offered mutual legal assistance to investigate the 1MDB scandal in respect of suspected swiss bank accounts linked to the same scandal. Michael Winzap further stated that the Barisan Nasional government had refused cooperation on the pretext that Swiss involvement 'could have a negative effect on local investigations' (which is squarely in line with the plaintiff's primary evasive testimony that involvement of foreign agencies might 'prejudice local investigations').

[117] Now, the only defences that the plaintiff could muster (in his submission) against the report is that the article did not specifically name the plaintiff or the Attorney General and that the defendant has not adduced any evidence to prove that the Swiss Government had indeed offered or sought for mutual legal assistance.

[118] But time and time again, the plaintiff's own testimony when tested during cross-examination, unravelled his own contentions. Firstly, whether or not exh D6 specifically named the plaintiff or the Attorney General is a non-issue. As the helm and top seat of the Nation's Prosecution agency, surely the plaintiff would be aware that the only person vested with the power to seek or offer mutual legal assistance is, the Attorney General. Thus, it should have reasonably dawned on the plaintiff that the report regarding the refusal of the Swiss Government's mutual legal assistance can only refer to his statutory prerogative to refuse mutual legal assistance under s 8(2) of the Mutual Assistance in Criminal Matters Act 2002. In fact, this sole prerogative and discretion was exactly agreed and admitted by the plaintiff himself during cross-examination:

> SK: You agree that the MACC could not seek the assistance of outside jurisdiction. They had no power, yes?
>
> PW1: Yes.
>
> SK: You agree that the police also had no power to seek the assistance of outside jurisdiction?
>
> PW1: Yes.
>
> SK: *And the only man who could do it was you?*
>
> PW1: *Yes, there a law to it.*
>
> SK: I'm very sure there a laws to it and I imagine that the law that you are referring to Sir is the mutual, forgive me.
>
> PW1: Mutual Legal Assistance in Criminal Matters Act

[119] The plaintiff's testimony on the existence of the Swiss Government's offer of mutual legal assistance is also confusing and self-contradictory. In one breath, the plaintiff insisted that there was no offer of mutual legal assistance from the Swiss Government:

> SK: Page 314, alright. This is a report by FMT wherein the opening paragraph. The Swiss government had offered assistance to authorities in Malaysia in the investigation of the 1MDB scandal but it was turned down by the previous administration. Michael Winzap said his government had asked for Malaysia's cooperation in its own investigations into the scandal'. *So you can confirm that during the time when you were AG, the Swiss government had in fact offered assistance.*
>
> PW1: *THEY DID NOT OFFER ASSISTANCE,* I can explain that the problem is that I cannot simply answer yes or no without giving the opportunity to explain. In fact as far as the Swiss government is concerned, for the record Yang Arif, I went to Switzerland twice to meet the AG of Switzerland. To say that I didn't cooperate or kept quiet is not correct.

[120] However, further down the line of cross-examinations, the plaintiff caved in and explicitly admitted that he indeed refused the Swiss Government's offer of mutual legal assistance:

> SK: So Sir you indeed refused cooperation. Agree?
>
> PW1: *I REFUSED COOPERATION* and I gave my reason and I corrected the *perception by the Swiss AG* that I did not cooperate, that's all.

[121] Time and time again the plaintiff's testimony during cross-examination kept on evolving and whimsically shifting. And this 'fickleness' further impugns the plaintiff's credibility as a witness.

[122] After admitting that he indeed refused the Swiss Government's offer of mutual legal assistance, the plaintiff repeatedly insisted that he had his 'reasons' to explain his refusal to accept or offer mutual legal assistance. However, thus far, the only two explanations the plaintiff has proffered to this court is firstly, that the involvement of any foreign agency would impede local investigation, and secondly, the plaintiff hides behind the non-justiciability and non-reviewability of his prerogatives under the s 8(2) of the Mutual Assistance in Criminal Matters Act 2002.

[123] Much has already been deliberated earlier on the plaintiff's erroneous insistence that a foreign agency's involvement may impede local investigation. Suffice for this court to reiterate that it was the plaintiff himself that agreed in his testimony that it is imperative to seek mutual legal assistance to bolster and support local investigations beyond the four corners of Malaysia.

[124] This court must also remark that the plaintiff's convoluted stance to hide behind Hanipah Farikullah J's (now JCA) decision (that the Attorney General's prerogatives under s 8(2) of the Mutual Assistance in Criminal Matters Act 2002 is non-justiciable and non-reviewability) is baffling. Firstly, to hide behind this decision is not at all any cogent reason that could explain his refusal to accept or offer mutual legal assistance.

[125] Secondly, it is puzzling that in the plaintiff's submission, the plaintiff insists that if indeed anyone is dissatisfied with the plaintiff's decision to refuse mutual legal assistance, then by all means the person should file for a judicial review against that decision. Nonetheless, right after staking that position, the plaintiff immediately hid behind Hanipah Farikullah J's (now JCA) decision and submitted that the plaintiff's decision is non-justiciable and cannot be reviewed by the courts. So in reality, the plaintiff is not at all genuinely suggesting a viable remedy, but instead championing the plaintiff's complete impunity in exercising his prerogatives and discretions.

[126] The above deliberations in this part considered, it is suspicious and reasonable to question, why did the plaintiff as the then Attorney General refused to accept the Swiss Government's offer of mutual legal assistance when the plaintiff is fully aware that monies had been siphoned abroad and that a mutual legal assistance is imperative to bolster local investigations? Why was the plaintiff so against the idea of a beneficial cooperative international investigation to unravel the 1MDB scandal and instead preferred to adopt the donation narrative? These suspicions and questions also reasonably justify the defendant's imputation that the plaintiff ought to be investigated for his refusal to accept mutual legal assistance from the Swiss Government (which may have assisted in the cover-up of the 1MDB scandal). In fact, the evidences justify the higher *Chase* Level 1 and 2 imputations that there might be grounds to suspect, and there might be grounds to believe that the plaintiff indeed committed acts (refusing mutual legal assistance from the Swiss Government) in covering-up the 1MDB scandal.

[127] Now, apart from the Swiss Government, the defendant also led evidences that even the United States Department of Justice ('DOJ') also reached out and sought for mutual legal assistance from the plaintiff. The defendant mainly relies on exh D8 which is an article dated 24 May 2018 entitled 'FBI, DOJ to give full cooperation to 1MDB special task force'.

[128] The author of exh D8, one Emir Zainul ('DW4') was called to testify on the contents of the exh D8. DW4 testified that the contents of exh D8 is an *ad verbatim* reproduction of a press statement issued by one of the task forces set up to investigate the 1MDB scandal. He frankly testified that indeed the Article does not attach with it the actual press statement itself, and he

appropriately explained that enclosing or attaching the source material with the publication is not exactly an industry standard practice. And this court is inclined to understand and agree. It is indeed not a common practice for the news, online and offline, to attach or append together the source material with the publication of the report or article. The pertinence of exh D8 is that it reported that the DOJ has already requested for mutual legal assistance, but was refused by the plaintiff on the oft-repeated ground that it would impede on the local investigations:

> The *DoJ also confirmed that it previously made a request, through a MLA (mutual legal assistance) to Attorney-General Tan Sri Mohamed Apandi Ali* on Sept 22, 2017,' the special task force said.
>
> However, *this request was not fulfilled and delayed; the reason given was that it would affect ongoing investigations* by Malaysian enforcement authorities.

[129] Now, the plaintiff takes an issue with exh D8 in that the purported press statement that exh D8 quoted is not produced before this court during trial. The plaintiff also disputes the sheer existence of the DOJ's request for mutual legal assistance on the ground that DW4 himself has never personally sighted the alleged request for mutual legal assistance by the DOJ.

[130] Upon this court's careful observation, this court is more inclined to believe that more probable than not exh D8 reports the truth regarding the plaintiff's refusal to offer mutual legal assistance to the DOJ. This is simply because of the following analysis:

(a) this court doubts the credibility and the cohesiveness of the plaintiff's testimony. The plaintiff's evasiveness has led the plaintiff to testify confusing and self-contradictory statements. Not only that, all throughout the cross-examination, the plaintiff has time and time again been caught to have contradicted his own previous documentary evidences;

(b) this court is more convinced with the neutral, frank, and candid testimony of DW4 as the author of exh D8. In full frankness and honesty, DW4 readily admitted that indeed the press statement was never attached together with the publication of exh D8. He also readily admitted that he never personally sighted the DOJ's request for mutual legal assistance to the plaintiff. Nonetheless, DW4 readily explained that it was not common place for news agencies to put in an 'attachment' onto the pieces that the agency authored and published;

(c) the contents of exh D8 bears an uncanny resemblance to the plaintiff's staunch refusal to accept or offer any mutual legal assistance on the purported concern that it might prejudice local investigation; and

(d) it is more probable than not that the DOJ (who is aggressively investigating, recovering assets, and prosecuting suspected personalities and co-conspirators to the 1MDB scandal) would have definitely reached out to seek mutual legal assistance in furtherance of the DOJ's investigations and prosecution.

[131] Even if this court were wrong regarding the plaintiff's refusal against the DOJ's request for mutual legal assistance, what is glaringly obvious and admitted by the plaintiff during cross-examination was that he himself, as Attorney General was sorely disinterested to pursue, and in fact has never reached out to offer or request mutual legal assistance from DOJ to investigate and trace the monies which were siphoned out of Malaysian jurisdiction. And the plaintiff has refused to do so even when he knows full well that monies were taken out of Malaysian jurisdiction and had to be traced internationally. The plaintiff also refused to do so although admitting he knew well that the DOJ was engaged in a suit involving known Malaysian personalities involved in the 1MDB scandal:

> SK: *Are you also aware that during your tenure as AG the department of justice in United States had also initiated civil recovery proceedings* relating to monies and assets syphoned from a Malaysian sovereign funds, the 1MDB. Are you aware?
>
> PW1: *Yes.*
>
> SK: Are you also aware Sir that during your tenure as AG that you refused to charge anyone, the PAC, the Public Accounts Committee had forwarded the report to the cabinet directing the police to continue investigation in April 2016? 4 months after you cleared Najib Razak, are you aware of that Sir?
>
> PW1: I'm aware of the PAC report.
>
> ...
>
> SK: Bundle B2, until 274. Now as the AG of Malaysia *Tan Sri can you confirm that you were aware of these proceedings taken place during your tenure relating to the Malaysian sovereign fund.*
>
> PW1: *Yes. I'm aware.*
>
> SK: Can I take you specifically to pages 34 and 35? Do you agree Tan Sri that these particular pages make reference to Malaysia personalities allegedly involved in the 1MDB scandal? Individual and also organization. Agree?
>
> PW1: I agree that at page 35 there's a name mentioned, J ho Low.
>
> SK: And 36, not only Jho Low.
>
> PW1: Yes, Jasmine Loo.
>
> SK: There was someone referred to as 1MDB Officer 1, Malaysian national, Executive Director of 1MDB. You have 1, 2 Malaysian national Chief Executive Officer over the page, Jasmine Loo, 1MDB Officer 4 Malaysian national, Executive Director of Finance 1MDB SRC Malaysian national Chief Executive Officer and Director Malaysian Official 1, high ranking official in a Malaysian government who also held a position of authority within 1MDB. Riza Aziz at page 37, Eric Tan who

is also Malaysian. Yes Sir? *You would agree that you were alerted to the involvement or the alleged involvement of Malaysian personalities in an ongoing US DOJ civil proceeding suit. You were alerted.*

PW1: *I'm aware of these whatever …*

SK: You were alerted to the alleged involvement of these personalities, you agree?

PW1: I agree but if I explain, Yang Arif.

[132] It is also baffling that during the plaintiff's cross-examination, the plaintiff found it difficult to even admit that the DOJ's prosecutions and asset recovery proceedings were relevant to him as the Malaysian Attorney General at the time. And after much pressure, the plaintiff caved in and admitted that he indeed had not reached out to offer or request for mutual legal assistance from the DOJ:

SK: As AG and in view of the fact this involved a Malaysian this in fact involved the Malaysian sovereign fund you were alerted, *you chose not to communicate with the DOJ in relation to their investigation which led to the filing of this proceedings. Do you agree?*

PW1: *I did not communicate with the DOJ that is correct.*

SK: *Was it not relevant to you?*

PW1: What? I mean …

SK: I will repeat, I have no issue. The DOJ investigation which led the serious allegation of the involvement of Malaysian syphoning the money in a Malaysia sovereign fund, you have told this court you did not communicate with the DOJ to obtain their result of investigation so my question to you as AG of Malaysia was it not relevant?

PW1: At that current time the investigating agencies were investigating into the 1MDB.

SK: I've asked you a specific question about results of the investigation of DOJ *and I'm asking you again was it not relevant to you?*

PW1: The answer is I did not communicate with DOJ but our own investigation was going on then.

SK: *My Lady. I think that it's very clear that the witness refuses to answer a very simple question as to whether or not it was relevant, I'll leave as that.*

[133] Having the above evidences in mind, it is suspicious and reasonable to ponder the question, why would the Attorney General refuse to offer or seek for mutual legal assistance from the DOJ, knowing full well that the DOJ is also aggressively investigating and tracing the 1MDB monies which were believed to have been used to purchase assets in United States? Why would the Attorney General insist on keeping the investigations localised when he knew well that the 1MDB monies were siphoned out of the Malaysian jurisdiction?

[134] These suspicions and questions also reasonably justify the defendant's imputation that the defendant ought to be investigated for his refusal to accept mutual legal assistance from the DOJ (which may have assisted in the cover-up of the 1MDB scandal). In fact, the evidences justify the higher *Chase* Level 1 and 2 imputations that there might be grounds to suspect, and there might be grounds to believe that the plaintiff indeed committed acts to cover-up the 1MDB scandal.

[135] In each heading of F(i), F(ii), and F(iii) above, this court has meticulously scrutinised all material facts, circumstances, and evidences and thereafter concluded that indeed the plaintiff's actions and inactions (during his tenure as Attorney General) indubitably gives rise to a plethora of harrowing suspicions and questions. These suspicions and questions does not simply appear out of thin air and accordingly have arisen due to the fact that the plaintiff's actions and inactions directly or indirectly may be seen to have assisted in the cover-up of the 1MDB scandal and the personalities involved in the same scandal.

[136] Through the entire breadth of the plaintiff's testimony, the plaintiff has failed to give any cogent reasons behind his perplexing insistence to adopt the donation narrative (while absolving Najib Razak) although he readily admitted that his Riyadh delegation has utterly failed in its mission to verify the truth behind the fabled and fantastical donation. The plaintiff further failed to afford any sound justification behind his puzzling decision to bend the truth regarding the supposed success of the Riyadh delegation (while in truth and reality, the Riyadh delegation had failed to speak or even meet with the fabled donor).

[137] The plaintiff also failed to explain his glaring lack of proper knowledge behind the supposed evidences and statements the Riyadh delegation collected, to the extent that the plaintiff could not even remember the name of the fabled or the famous donor he so intently contended upon.

[138] The plaintiff further failed to make any good sense out of his unwavering and unyielding insistence to not offer or seek mutual legal assistance from the Swiss Government and the United States DOJ although admitting that mutual legal assistance may well bolster local investigations especially in view of tracing the monies which were siphoned out of the Malaysian jurisdiction.

[139] The plaintiff then failed to explain his eager adoption of the donation narrative although he knew full well that part of the monies (SRC monies) were paid from SRC's accounts and not from any Saudi Royalty's accounts. The plaintiff further failed to explain his hasty decision to NFA/KUS the

investigations (against the recommendations of the MACC and his own internal task force) although knowing full well that his own Riyadh delegation's investigations were incomplete.

[140] Analysing all of the plaintiff's many conducts he failed to explain here, it is sublimely apparent that all his conducts indeed reasonably infer an effective cover-up of the 1MDB scandal and the personalities within the scandal. Of course, this court's conclusion here is by no means a finding under the lens and weightage of a criminal offence of 'aiding and abetting' (which this court had found not to be the appropriate meaning or imputation in the first tier of the exercise).

[141] But at the very least in the realm of the defendant's defence of justification, the defendant indeed has led concrete evidences to justify his defamatory imputations (across all *Chase* Levels 1, 2, and 3 imputations). The evidence and circumstances do give reasonable grounds to investigate the plaintiff, and the same evidence and circumstances goes as far to give reasonable grounds of suspicion and in fact, commission of the plaintiff's cover-up of the 1MDB scandal.

[142] Thus, it is exceedingly obvious that the defendant has successfully led cogent evidences to succeed in his defence of Justification.

[143] Just for the sake of clarity, this court is also minded that the defendant has also led circumstantial evidence as to the abrupt appointment of the plaintiff as Attorney General (and the summary removal of Tan Sri Datuk Seri Panglima Abdul Gani bin Patail from the Attorney General's Office) as well as the plaintiff's alleged political ties with Najib Razak as a fellow UMNO man. Notwithstanding, even if these circumstantial evidence may be relevant to the present case, it would proper and prudent of this court to uphold the 'best evidence rule' and prefer the myriads of tangible direct evidences which are readily available before this court. The defendant's defence of justification is sufficiently proven even without the aid of these circumstantial evidences.

G. WHETHER THE DEFENDANT HAS PROVEN A DEFENCE OF FAIR COMMENT OR QUALIFIED PRIVILEGE

[144] This court has meticulously analysed and deliberated all relevant facts, circumstances, and evidences *in extenso* in heading (F) of this judgment. For the sake of brevity, it is prudent for this court avoid protracted repetition and redundant analysis of the very same facts, circumstances, and evidences. Suffice that this court directly applies the law on the extensive breadth of evidential deliberations earlier in this judgment.

[145] In essence, the defendant has already proven a full defence of justification and any further issues on additional defences of fair comment and qualified privilege is academic. Nonetheless, for the sake of completion, this court shall still succinctly address these two latter defences.

G(i) Whether the defendant has succeeded in proving its defence of fair comment

[146] This court appreciates and agrees with the learned counsel for the plaintiff that from a technical standpoint, the defendant had failed to comply with the statutory requirement under O 78 r 3 of the Rules of Court 2012 (in failing to appropriately particularise and demarcate which portion of the impugned statement were facts, and which portion of the same were comments).

[147] The defendant's pleaded defence under the heading of fair comment is indeed brief and is clearly lacking the appropriate particularisation that is statutorily required to be pleaded. The defendant's pleaded defence of fair comment merely alludes to the defendant's contention that the matters which the defendant had commented upon were matters of public interest. This brief pleading, is clearly insufficient. Without any proper demarcation and particularisation, it would be impossible for this court to make the appropriate analysis and comparison between the purported comments and the statement of facts which the comments rely upon.

[148] Thus, although succeeding in proving his defence of justification, the defendant has (on this technicality) failed to satisfy this court of his defence of fair comment (see *Tan Sri Dato' Lim Guan Teik v Tan Kai Hee* [2014] 9 MLJ 363; [2013] 10 CLJ 771; and *Jeramas Sdn Bhd & Anor v Datuk Wong Sze Phin @ Jimmy Wong* [2021] MLJU 2037; [2021] MLRHU 1598).

G(ii) Whether the defendant has succeeded in proving its defence of qualified privilege

[149] As rightfully highlighted by the learned counsel for the plaintiff, in order for the defendant to succeed in his defence of qualified privilege, he must prove:

(a) firstly, that the publication was made on a 'privileged occasion' (in that the publisher has an interest or duty, legal, social, or moral obligation to make it to the recipient to whom it was made); and

(b) secondly, that the recipient to whom it was made has a corresponding interest or duty to receive the publication.

[150] As a baseline, this court is minded and is in agreement with the learned counsel for the plaintiff that the mere alluding to the fact that the defendant is an elected representative and a serving member of Parliament does not automatically qualify him the privilege to vent out his statements in any public channel he so chooses.

[151] This court understands and agrees that in the defendant's service to the *rakyat* as their representative, he must satisfy his duties in utmost decorum, and with due respect to the law and the appropriate avenues and channels to voice out his mind. Any parliamentary member ought not to be so inclined to resort to the court of public perception (unless there are just causes to do so). This court was referred to and is in agreement with the decision in *Chong Siew Chiang v Chua Ching Geh & Anor* [1992] 1 MLRH 535:

> So no privilege will attach to a complaint as to the conduct of a public official *if it is given out for publication in the newspapers in advance of its delivery to the proper authority for investigation.*

[152] But that is not to say that it is an absolute rule that a public officer or member of Parliament cannot speak his mind to the greater and wider public (or even to the world at large). As this court have said, if there shall be any just causes which presses the defendant to do so, and the defendant has exercised due care and responsible journalism, then the defendant would be well within his rights to voice out his thoughts to the public at large.

[153] Even the court in *Chong Siew Chiang* above qualified its decision that the defendant may still be within his qualified privilege to publish his statement in the newspaper if he had first, voiced out the same statement through the proper channel or authority for investigation.

[154] Similarly, the Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187; [2015] 8 CLJ 477 had held that in instances where publication was made to the public at large, then it is incumbent on the defendant to prove that he had exercised responsible journalism (to verify the impugned statement) before he can rely on the defence of qualified privilege:

> Moreover, the defendant contended that as a Member of Parliament and a member of the Water Review Panel, he had a legal and social duty or interest to publish the article and the public had a corresponding interest in receiving the same. It was against this background that we should view the contention of the defendant that the publication of the impugned words was an occasion of qualified privilege as enumerated in *Reynolds v Times Newspapers Ltd*.
>
> In our judgment, the Court of Appeal had failed to consider that the defendant's knowledge of the plaintiff's true position and failure to disclose these facts would suggest that his conduct was unreasonable and would go against the concept of

responsible journalism. *In our judgment, the defendant had failed the responsible journalism test in failing to take responsible and fair steps to gather, verify and publish the impugned words.*

[155] So, has the defendant satisfied these two pre-requisites before he can rely on the defence of qualified privilege? This court is of the view that the answer is a resounding 'yes'. It is notoriously and infamously known (even in public domain) that the call to appropriately investigate and to mount charges against known personalities in the 1MDB scandal had for years echoed in all reasonable and foreseeable proper channel of complaint.

[156] For years since the 1MDB came to light nationally, there was an uproar by a plethora of public officials, and even the *rakyat* calling for transparency, honesty, and clear explanation to unravel the 1MDB scandal. Task forces were established and mobilised (involving the MACC, the police, and even the Attorney General's Chambers) to investigate and to make the appropriate recommendation on how best to curtail the 1MDB scandal. But as this court has deliberated at length above, it is apparent that these complaints to the proper channels have for years fallen to deaf ears, until the plaintiff was relinquished of his position as the Attorney General, and until the Barisan Nasional Government fell in the 14th General Election. This court must highlight that it was plainly admitted by the plaintiff during cross-examination that indeed there was not even one person ever prosecuted for the 1MDB scandal during the entirety of the plaintiff's tenure as Attorney General:

SK: *But you confirm during your tenure as AG*, 2 years or more in fact almost 3 years *no one was charged under your watch. Agree?*

PW1: *Agree.*

[157] In the specific instance of the present case, indeed all of the reasonable and foreseeable channels have been exhausted and thus, the defendant is well within his rights to voice out his thoughts to the public at large.

[158] Furthermore, relying on the same extensive deliberation of evidences in heading (F) above it is patently obvious that indeed the defendant has exercised responsible journalism and has appropriately verified and justified his impugned statement.

[159] Having satisfied the pre-requisites above, this court now shall proceed on determining the basic elements of the defence of qualified privilege.

[160] Firstly, does the defendant has an interest, or duty, legal, social or moral obligation to publish the impugned statement in his blog? The answer is a resounding 'yes'. The sordid affair of the 1MDB scandal seeks to destroy and

bring Malaysia's administration of justice, policing and criminal prosecution, social and financial governance to utter disrepute. When the 1MDB scandal involves criminalities and illegalities, social and economic repercussions to the nation's economy, and the morality of the nation's top leaders and agencies, it is well within the *rakyat*'s (not just the defendant as member of Parliament) interest and duty, to voice out their dismay and enmity, especially when all avenues of query and complaint have already been exhausted (only for their uproar to fall on deaf ears). Secondly, on the same score, the *rakyat* and public at large absolutely has a corresponding interest to be in-the-know and informed to all movements and calls against the plaintiff to explain himself and his actions (and inactions) which directly and indirectly lend a hand in covering-up the 1MDB scandal and the known personalities involved.

[161] Thus, in view of the deliberations immediately above, this court finds that the defendant has succeeded in proving his defence of qualified privilege. Thereto, since the defendant has successfully proven his defence of justification and qualified privilege, his publication of the impugned statement is not actionable against the defendant.

H. THIS COURT'S DECISION AFTER FULL TRIAL

[162] It is this court's decision that on the balance of probabilities, the plaintiff has failed to prove his claim in the present case. In view of all the aforementioned deliberations and findings, this court hereby dismisses the plaintiff's claim against the defendant.

I. ISSUE OF COSTS

[163] Upon consideration of the brief submissions put forth by the counsels for the defendant and the plaintiff on the issue of costs, this court hereby orders that the plaintiff to pay costs of *RM80,000* to the defendant, subject to allocatur.

Claim dismissed.

Reported by Ahmad Ismail Illman Mohd Razali